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ABSTRACT

Proceedings of a 1981 conference on professional competence and the law are presented. The perspectives of educators Leon Trakman, Murray Fraser, and Stewart Macaulay concerning the educational needs of the legal profession and the role of the law school are presented. The Canadian justices McIntyre and Cowan comment on the quality of lawyers' skills, as revealed by legal counsel in court, and the competence of judges to weigh evidence and render judgment. Issues pertaining to Canadian law schools, and, specifically, developments in Ontario and at the University of Toronto, are addressed by law school representatives Frank Iacobucci, Hudson Janisch, William Charles, Grant Hammond, and Rod MacDonald. In addition, four seminar papers are presented: "Are Judges Competent?" (Chris Axworthy); "Are Practitioners Competent?" (Ronald Pugsley); and "Are Law Teachers Competent?" (Leon Trackman). After an address entitled "Incompetence: The North American Experience," (Roger Cramton), lawyers Edwin Harris, Arthur Maloney, Peter Green, and Brian Flemming evaluate lawyer competence from the prospective of law school and continuing legal education programs, and consider controls exerted on lawyers through professional regulation, litigation, and punishment. Additionally, the social costs of incompetence are addressed by A. Wayne MacKay, Stewart Macaulay, Justice Glube, and Agar Adamson; and forecasts and prescriptions are offered by Roger Cramton, Justice Jones, and Arthur Maloney. Group discussions follow all the papers, and a list of participants is appended. (SW)

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PROFESSIONAL COMPETENCE AND THE LAW

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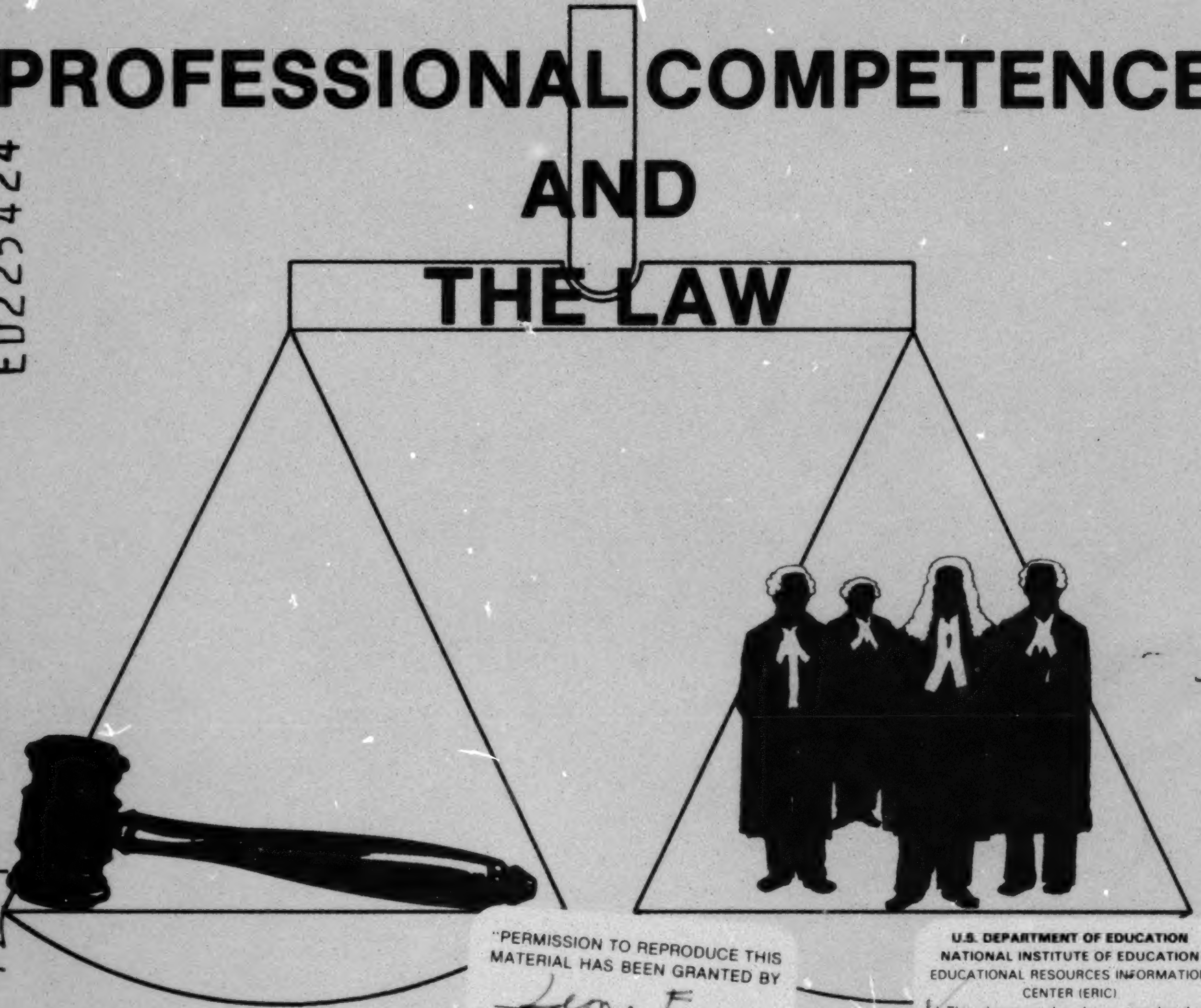

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PROFESSIONAL COMPETENCE
AND
THE LAW

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INTRODUCTION

This past decade has produced many strains within the legal profession. Technology has added to the complexity of lawyering activities, while the honesty of members of the profession has been seriously challenged. The role of the general practitioner in law has come under increasing fire.

Blame has come from within. The bar has criticized the teaching profession for failing to equip aspirant lawyers for the practice of law. The bench has attacked the bar for inadequate pre-trial preparation, poorly filed documentation and insufficient advocacy skill. Much of the difficulty has been ascribed to legal education. As Chief Justice Warren Burger of the United States Supreme Court contended: "how lawyers are trained--during and after law school--will determine their skills as advocates and ultimately the quality of our justice."

Yet competence in law is a multifaceted phenomenon. The performance of the law teacher influences the performance of the legal practitioner. The competence of the lawyer affects the competence of the bench. Each lawyering function is interdependent; each requires careful scrutiny; and each warrants continual development in order to enhance the ongoing quality of legal services.

Various problems arise in determining the ambit of professional competence. The very word "competence" introduces the question: what is "competence", who decides, and what is the effect of that determination? The word "professional" involves similar queries. Does professional behaviour relate exclusively to norms created by the profession itself, or does professionalism emanate from a societal standard of ethics that is superimposed upon the legal profession? Undoubtedly, problems of definition would be considerably simplified if a uniform conception of "professional competence" could be devised; but this presupposes the existence of uniform values, consistent choices and common ideals. In fact, lawyers often disagree over the parameters of "competence"; while society seldom concurs as to the limits of "professionalism". Perfect consensus over definition is only truly possible where the legal profession and society at large agree upon the nature of the legal profession, the function of the lawyer and the role of the judge and the law teacher.

Similarly problematic is the attempt to define concepts like "ethical", "moral" and "proper" behaviour. Ethics has a wide and often confusing area of potential operation. Firstly, the content of ethics is relative to society; ethics is not an absolute and immutable system. Secondly, the nature of ethics changes from social group to social group; its meaning depends upon what each social group regards as moral and proper behaviour. Any attempt within the legal profession to define legal ethics therefore presupposes an understanding of the changing content of social mores and most importantly, the impact of those mores upon the legal system itself.

These questions are raised thoughout the course of these conference proceedings; they are dealt with by the judges, practitioners and law teachers alike. Yet "competence" and "professionalism" are characterized differently by different speakers; nor should it be otherwise. What is considered competent and professional, and why, comes from an individual's legal training and experience. It is the reflection of skill and diligence, personality and character. That legal training and experience, that skil and diligence is the central focus of this conference.

ACKNOWLEDGMENTS

This collection of materials is very much a joint venture. Many thanks are owed. The authors of the various papers and comments willingly gave of their time; they wrote, presented and voluntarily revised their work; the quality of the collection reflects their collective diligence.

Faculty and staff at the Dalhousie Law School also gave wholehearted support to the conference venture. Dean W.H. Charles encouraged the activity from the outset. Professors Steinberg and Crocker assisted in organizing the event, while Monique Dancause and Cathie Neeson produced the materials on their Micom system.

Professional and governmental agencies gave financial and administrative support to the project. A generous grant from the Law Foundation of Nova Scotia initiated the conference. The Canadian Bar Association provided additional support, while the Department of Justice offered a grant specifically for the purpose of producing these materials.

However, the greatest personal debt of gratitude must go to Douglas Watters, who, in his capacity as research assistant, worked in the production of both the conference itself and the conference materials that follow.

Leon E. Trakman
Dalhousie Law School
January, 1982

Welcome Address:
President W.A. MacKay

Ladies and gentlemen, I simply want to say, on behalf of the University, a word of welcome to you--and those of you particularly from outside of Nova Scotia--who have come to this conference. I also wish to thank the Law Foundation of Nova Scotia, the CLE--Continuing Legal Education Society of the province and the Canadian Bar Association for working with my colleagues in the Law Faculty in putting together and supporting this Conference on Professional Competence and the Law. I have particular pleasure in being back in the Law School. I get back here too infrequently now. I had the pleasure up until this year of teaching a law class twice a week here--the students were good enough to put up with me. I am delighted to come back to the Law School on this as on any other occasion. I used to think when I was the Dean of the Law School that I would some day lead a movement to direct legal education along the lines that some other professions have followed. I had in mind, in particular, perhaps the medical profession, where it seems to me the blend of professional and academic expertise devoted to the training of future practitioners in medicine presents a very useful model that is worth some examination. But someday I may get back in the Law School and test that thought, so I don't want to give the idea away.

In any event I hope that the conference proves as useful to you as I am sure my colleagues who put the program together intend it to be. I may say that it is a great delight that the members of the bench--your Lords, your Honours and members of the academic and practicing profession are all here to participate. I know that competence is of a very significant concern to all members of the profession, whether they be at the bar, on the bench or in law schools.

Mr. Chairman, Professor Trakman, thank you for the opportunity to be here. Thank you very much indeed.

PROFESSIONAL COMPETENCE AND THE LAW

First Session: Friday, May 29, 1981

WHAT'S AT STAKE: AN EDUCATOR'S PERSPECTIVE

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INTRODUCTION

Are law teachers competent; are they trained to teach law; and do they fulfill this function adequately and completely?

Law professors are constantly chastised for failing to provide aspirant lawyers with the practical skills that are necessary for the conduct of legal practice. Professors are accused of maintaining an ivory tower existence in which they are isolated from the world of reality and ill-attuned to the demands of the legal profession.

The papers in this section address themselves to the educational needs of the legal profession and the role of the law school in responding to such needs. Educational concerns include: the increased complexity of the legal system, the growth of specialization in legal practice and the demand that law schools alter their educational programs to take account of the dynamic evolution of society and the effect of social change upon legal education. Emphasis is given to training of law teachers, the structure of law school syllabi, and the interaction between theoretical and clinical education in law. The overriding concern of this section is to assess existing methods of legal education, their virtues and pitfalls, and their potential for modification in the face of the increasingly diverse role of the law and the law graduate.

PROFESSOR LEON TRAKMAN
DALHOUSIE LAW SCHOOL

Introduction

The issue of professional competence is a relative one; for competence in law is related to the character of lawyering itself. It is based upon the performance of those who practice the law, their skills and legal propensities. Yet the extent to which each individual lawyer is competent or acts professionally hinges upon who determines the nature of competence in law and what standards of competence are applied to the lawyering process.

This paper examines the issue of professional competence principally from the perspective of a legal educator functioning within a law school setting. These primary questions are posed. Firstly, what is the meaning of "professional competence" in the legal profession? Secondly, who determines the parameters of professional competence in law? Thirdly, what forms of legal education are needed in order to provide society with lawyers who best satisfy such standards of professional competence.

Defining Professional Competence

What does professional competence mean? The answers are many. Any concept of professionalism demands a standard of ethics, a level of honesty and decency, a degree of ability and, most importantly, a minimum level of performance. Competence is therefore a measure of both capacity to perform and performance itself. The lawyer must be able to carry out lawyering functions with a requisite degree of knowledge and skill; and he or she must also be willing to perform such functions honestly, and completely, and on time. In addition, lawyering requires psycho-sociological abilities: for the law is a human science that addresses public and private concerns alike. A competent lawyer is therefore one who is able, not only to recognize social needs, but also to respond to them by recourse to legal institutions, doctrines of law and specified legal procedures.[1]

Undoubtedly, lawyering demands both the diligent and the ethical execution of legal responsibilities. The lawyer needs to know how to reason in and about the law, and how to fulfill his or her tasks with diligence and with deliberateness, with efficiency and with conscientiousness. An inability, or an unwillingness, to fulfill any of these legal roles gives rise to the pertinent query: was that conduct competent and was that performance professional?[2]

The meaning of the term competence should not be over-extended. Competence does not equal omnicompetence. No lawyer can be expected to carry out with perfection all legal functions that might arise. No lawyer can be expected to know all law, considering the complexity of legal rules and the diversity of factual issues. Legal practitioners simply cannot canvass every conceivable legal avenue. Moreover, lawyers differ from one another in sophistication, counselling skills, drafting ability and capacity to litigate. They are not alike in all matters of competence.[3]

Yet it is precisely the popular myth that lawyers are all-able, all-knowing and all-seeing in respect of the law, this nemo juris ignorantiam excusat notion, which produces the greatest threat to the legal profession. For such a belief induces in society an unrealistic expectation that satisfaction should and can always be provided by the legal profession. Such a misconception produces a deep-seated mistrust of lawyers especially when what the public expects is not forthcoming. Whatever professional competence might mean, it should not mean perfection in legal know-how and professional ability. Unjustified social expectations of lawyers give rise to unjustified criticisms of lawyers. A legal profession that perpetuates a myth of infallibility defies growth. We should move in the other direction.[4]

Standards of Competence

Understanding the meaning of competence in law presupposes an understanding of the meaning of law itself. The competent lawyer is expected to "know" the function of the law and to comprehend its operative mechanisms. Yet lawyers are not uniform in their capacities to perform. They have differing abilities in oral advocacy, in negotiating contracts, in drafting wills and in conciliating conflicts. Just as they are different as persons, so do they differ in their ability to assimilate information and articulate arguments. How, then, do we distinguish the competent from the incompetent? Where is the dividing line between professional and unprofessional behaviour?

A single standard of competence, applied absolutely to all, is undoubtedly most convenient; for it is certain in nature and predictable in operation. But fixed standards produce rigid results. Once fixed, they fail to allow for the differing abilities of lawyers. Surely the specialist lawyer should not be judged by the same standard as the non-specialist? Surely a single standard of competence does not promote justice if it regulates experienced and inexperienced lawyers alike, without differentiation.[5]

Relative standards of competence offer the advantage of flexibility. Yet relativism raises this crucial question: relative to whom; and relative to what degree? All lawyers could be required to perform at some minimum level of competence. But what might this minimum level be? Alternatively, standards of competence could be relative to the qualifications of the practitioner, reflecting his or her training in law, experience in practice and complexity of function. Yet such relativism introduces not only a lack of clarity as to what constitutes competence, but also a discriminating standard in favour of some practitioners at the expense of others. Most importantly, if relative standards of competence are to apply, who should make such decisions and in accordance with what criteria?[6]

The relative character of professional competence evolves out of a weighing of interests. These include private and public concerns, social and economic demands, and political and cultural forces. Thus the performance of lawyers should be judged, in part, in the light of the background and experience of individual practitioners and, in part, in accordance with community standards reflecting social need, financial exigency and political expectation.[7]

Ultimately, absolute standards of competence must be weighed against relative standards. To impose a rigid and unchanging standard of competence upon lawyers to the exclusion of all else, is to reduce professional standards to their lowest common denominator. To require from lawyers only a minimum standard of competence is also to shelter, indeed cloister, the legal profession from public responsibility, notwithstanding social demands for more exacting standards of professionalism.

Expectations of Lawyers

A key problem in determining the parameters of professional competence lies in identifying the interdependence that exists, or should exist, between self-, social and legal expectations of lawyers. Society at large, the law society, the bar and the individual lawyer all influence the character of legal competence. Yet which force should predominate; who is the primary determinant of professional competence; and what are the parameters of such decision-making power?

Lawyers are functionaries charged with public responsibilities. Their service to the public should accord with the existing social need for such service; and their competence should advance in line with the advances of society.[8] Thus competence in law presupposes knowledge about man in society, and about the control imposed by law upon man in society. Each increase in social-cultural complexity gives rise to a legal reaction to such complexity. Each development of mankind should be counterbalanced by an equivalent development in the ordering of mankind. Variations in social attitudes should be reflected in variations in the legal regulation of attitudes. Developments in technology should be embodied in the legal control exerted over such technology. Just as lawyers need to monitor cultural and economic development, they also need to evaluate the lawyering process in terms of such development.[9]

Community attitudes cannot be ignored in evaluating what is a "worthy" legal fee, a useful piece of legal advice or the most justifiable conclusion to a legal confrontation. Yet community assessments of legal competence have inherent limitations. Perceived legal abilities, as evaluated by lay members of society, may well differ from real legal abilities. Apparent legal sophistication may disguise very real legal deficiencies. So long as the client feels that he is receiving value, he is assuming the existence of competence which may not exist in fact. So long as such public misconceptions prevail, community determinations of competence in the practice of law will be inadequate as a measure of ability and performance in law.[10]

Can the lawyer be directed to regulate his own performance through education and restraint, caution and precaution? Certainly, competence in law is maintained in part by voluntary means. Lawyers attend continuing legal education conferences; junior members of the bar consult with senior colleagues; and law libraries facilitate learning in the law. But self-motivation has limits. It takes time to learn. It costs money to attend conferences; and the general practice of law makes it difficult to follow complex developments in multiple legal areas. To rely entirely upon personal motivation in the search for competence in law is to disregard human frailty. Growth in legal knowledge and skill presupposes that individual lawyers aspire towards such growth. Such may be the case, but this need not necessarily be so.

What of the legal profession? Should and can the profession as a whole create and implement standards of professional competence; and if so, how should such standards be determined and how are they to be enforced? Undoubtedly, the "regulation" of the legal profession must, to a large degree, emanate from lawyers themselves, acting as a collectivity. Lawyers are better able than the lay public to evaluate the competence of other lawyers; they are better informed than non-lawyers about the nature and significance of law; they are also less readily misled in the assessment of legal competence than is society at large.[11]

Yet how do we limit the risk of self-interest in a legal profession charged with the responsibility to evaluate itself; and how do we ensure that the competence of lawyers advances as technology, knowledge and innovation advance? The answer must lie, to some degree, in the institutionalization of professional competence within an ordered framework, reflecting a predetermined structure and content. Complex questions of methodology must be resolved: how is professional competence to be institutionalized in legal form; and most importantly, how is this to be achieved? The answers, it is suggested, lie primarily in the hands of the bar and the law school. Competence training is their shared duty; incompetence is their joint responsibility.

The Role of the Bar

Standards of professional competence can be created at various levels. They are often devised in law school programs, in courses on legal ethics and professional responsibility, in seminars devoted to legal education and jurisprudence. Yet can we teach aspirant lawyers to be moral? Can we show them what is responsible and competent behaviour in a classroom setting, in the absence of prior professional experience and training? The answer is surely a qualified no: we cannot teach aspirant lawyers to be honest and trustworthy, but we can inform them of the moral and legal consequences that flow from dishonest and untrustworthy conduct. We cannot show students how to be professional in their legal practices before they even have such practices, but we can instruct them in the conduct of simulated or clinical legal practice.

The bar has a vital role in the professional and competent training of its membership. Various reasons give rise to this responsibility. Of necessity, training in legal competence is an ongoing function; it does not cease on graduation from law school; it does not end on the award of a law degree. There is a need for extending the boundaries of education as new legal procedures, novel problems of law and more complex issues of fact arise in the societal sphere. No lawyer can hope to graduate from law school with an ability to weather all legal storms. His competence reflects his experience; and so long as his preexisting experience is primarily academic or simulated in nature, his competence in practice is likely to be limited. We cannot set unrealistic training goals for law schools.

Yet how is such education in law to be provided? Do we mandate programs in continuing education, compelling all lawyers to participate in such exercises?[12] Or should continuing programs be voluntary, dependent upon the willingness of lawyers to undertake training in specialist or generalist, practical or academic areas of law? Surely both. Voluntary and mandatory education in law are complementary means of attaining professional competence in law; they are not mutually exclusive.

How, too, can we train lawyers effectively after completing law school but before they are admitted to the Bar? Experience in British Commonwealth jurisdictions reveals several forms of post-law school training, in particular, periods of articling and bar admission courses. Each has distinctive characteristics. Articling periods provide the law school graduate, now a trainee lawyer, with an exposure to the practice of law under the supervision of qualified members of the Bar.[13] Bar admission courses follow periods of articling. They give aspirant lawyers an opportunity to study law in organized programs of instruction, created and conducted by the Bar itself.[14] Both of these post-law school activities have particular virtues and pitfalls in relation to professional competence; each will be examined below.

The articling system has a number of distinctive attributes. Properly supervised, the shortly-to-be lawyer is introduced to the practical day-to-day activites of a law office. Court-rooms, clients and administrative tribunals all represent areas of learning. The student lawyer is exposed to the law as it operates, not merely as it appears in a case-book, in a simulated problem or in a lecture.

Yet legal articling, as a system, does not necessarily assure competence; it is only a possible means towards competence. Strengths must be balanced against weaknesses. What of the costs of the articling system; what of the problems of supervising articling students in diverse legal areas; and what of the need to train students and yet operate a viable legal practice? Articling programs also need to be structured. One may well ask: how long should the articling period be--six months, a year, or perhaps two years; and who should be responsible for such programs--the Bar, segments of the Bar, the legal profession as a whole, or some other body? Articling programs also require coordination. Program organizers must decide upon the role of law firms who particapate in such programs: should lawyer-employers be required to supervise and examine articling students according to prescribed standards in order to ensure a minimum quality and breadth of training? Moreover, should they be required to report on the quality of student performance after or during such articling periods?

To date, few of these controls have been comprehensively introduced into the articling system within commonwealth jurisdictions. Supervision of articling students is usually ad hoc, varying in quality and intensity from law firm to law firm, and from supervisor to supervisor. The utility of such articling programs, regretfully, depends more upon chance than design; seldom are articling systems monitored by the Bar; seldom are supervising lawyers required to provide specific forms of training; and seldom are reporting responsibilities imposed on either lawyer-employers or student-employees.[15]

The value of the articling system inevitably hinges upon the manner in which the system is implemented and the method by which it operates in practice. Minimum criteria for the functioning of articling programs should include: the development of a supervised and coordinated activity; the implementation of standards of performance to be complied with by supervising lawyers; and the monitoring of articling activities through reports on student-lawyers, submitted by supervising lawyers to the coordinators of articling programs. In the absence of such controls the operation of the articling system is likely to remain as questionable in nature as are its current procedures, and as doubtful in effect as is its present record.

Bar admission courses can be useful in training lawyers for professional practice. Introduced after the completion of an articling period, they provide a useful link between theoretical and practical legal education. The bar admission student who now possesses a law school background and an articling experience, is introduced to practical legal subjects, both procedural and substantive as taught by members of the Bar. The bar course, usually followed by an examination, is that final introduction of the student to the legal world before he actually enters the ranks of the qualified profession.[16]

But to what extent are bar admission courses necessary to the development of professional competence; and if deficiencies in such courses are revealed, how are they to be remedied? The answers are varied. Bar admission courses should encompass not simply the learning of descriptive law but also an exposure to legal analysis and to the practical problems that are encountered in the performance of lawyering functions. In addition, the aspirant lawyer needs to appreciate in what circumstances questions of professional competence are most likely to arise in practice and, most importantly, the ways in which the student-lawyer can either avoid the occurence of such incompetence or remedy its effect through countervailing action. Thus the Bar Admission course, together with the articling system, represents that last stage at which the aspirant lawyer, shortly to enter legal practice, can be forewarned of the pitfalls that most frequently arise in professional life.

Bar admission courses still give rise to specific questions of structure and content: who should administer such programs; what courses should be included; and most significantly, what should be their orientation? Ideally, the Bar itself should be primary administrator of these courses, since the Bar is best equipped to identify the needs of legal practioners, their required qualifications and practical skills. Difficult decisions must be reached. For instance bar admission courses, especially in substantative law, should not be totally theoretical in content; legal theory is most usefully taught by law professors who operate within academic confines over a more extensive three year period. Yet bar admission courses still need a theoretical superstructure that can integrate disparate legal concepts, doctrines and rules of law into a homogeneous mold. Compromise is therefore inevitable; a balance must be struck between formal instruction *in* and knowledge *about* the law; we cannot expect less from aspirant lawyers, nor should we.

Competence in law still cannot materialize out of a static mold. Teaching lawyers to be professionally competent within practice-oriented programs should be systematized in accordance with social need. Learning the law should be adaptable in nature if the legal profession is to respect, and thereby be respected by, society; such is ultimately a necessary goal of both articling and bar admission systems if public interests are to be taken into account.

The Role of the Law School

The development of professional competence in law is also very closely related to the law school environment in which legal training is initially provided. Law schools can be exclusively academic centres for the theoretical training in law; or they can also provide practice-oriented training in legal technique. This dichotomy, viewed as a choice between one or the other alternative, has plagued legal educators for decades.[17] Law schools may indeed serve as clinical centres in which legal skills are acquired in simulated and real world settings. But, if this be so, there is still a need for an intellectual environment in which an education in legal theory is offered. Theoretical knowledge is the backdrop against which practical skills are subsequently displayed. Moreover, it may well be asked whether law schools have the facilities to serve as practice centres, given the role of the articling system and Bar admission courses in the acquisition of legal skills.

Even if the function of the law school is defined in academic terms, the structure of education programs must still be established. There is a need for educational direction. There is a demand for planned action in determining the nature of law courses. Law school syllabi should be rationalized in terms of the community of interests which lawyers are pledged to serve. Methods of instruction are required which foster those legal skills which legal practitioners need in order to fulfill their professional responsibilities.[18]

No single form of instruction in law can satisfy all community wants, and no one method of learning can respond to the heterogeneous backgrounds and interests of each and every aspirant lawyers. Yet no matter how relative educational needs in law are, they still warrant a coordinated base. They require a cohesive foundation. They need a sound and well-reasoned superstructure.

At present, there is evidence that an unstructured educational system has evolved. An over-abundance of unsystematized courses are being offered in North American law schools. A study of law school catalogues demonstrates that the number of law courses has multiplied significantly over the last two decades. Courses sometimes lack design. They frequently overlap with one another in content. It is often difficult to differentiate between them in theoretical orientation. Frequently, their creation can only be rationalized in terms of the personal and research interests of particular teachers.[19]

Within this educational process, emphasis may well be placed on the "academic freedom" of both professor and student. The teacher decides what to include in his syllabus and how to teach the subject. The second and third year law student, in turn, is largely free to choose his or her own courses, to determine what to study and what to avoid studying. This apparent freedom of choice is based on a fiction. It presupposes that a student is able to make an intelligent course selection even before he or she is able to appreciate the significance of that choice. It is founded upon the further misconception that a law teacher who orients courses around his or her own idiosyncracies necessarily exercises academic freedom.[20]

Specific deficiencies are also evident in the very structure of our law school programs. Firstly, objections can be made to the classification systems that are currently used to determine the nature of law school syllabi. For instance, are contracts and torts truly serviceable subject-areas or should they be reclassified? An alternative classification, linking together both contracts and torts in a single subject, might well be more realistic. Another choice might be to reclassify "rights" arising in contract and tort and distinguishing these from "remedies" associated with contracts and torts. This encourages an intermeshing among related principles of law; and at the same time, it distinguishes between legal "rights" and legal "remedies". Nevertheless, the key issue is not whether these proposed classifications are suitable; the issue is whether current course classifications are acceptable in the light of a dynamic and ever-growing range of competing alternatives.

Secondly, appellate advocacy skills are often overstressed in law schools at the expense of other methods of teaching and learning.[21] Law Schools concentrate upon the appellate process. Students study appellate cases.They moot in simulated appellate courtrooms. But what of the pre-appellate activities of lawyers? Surely these, too, are encompassed within the needs of the competent practitioner. Surely the aspirant lawyer should not be trained almost exclusively in an appellate role where there are a multitude of non-appellate functions which the competent lawyer may be expected to perform.

Lawyers require far more than an ability to argue cases. They should know how to negotiate agreements, what strategies to employ in reaching consensus and what instruments to use in resolving disputes in the absence of such consensus. They need to understand how to draft and interpret documents, and how to avoid ambiguities in the construction of such documents.

However, the greatest need of all is for an integrated approach towards professional competence. There is a call for cohesion in teaching and learning, for structure in law school programs and for direction in the orientation of legal studies. Courses in law cannot evolve simply by osmosis, by mere chance or by a teacher's whim. Methods of instruction cannot develop along isolated lines, ill-attuned to the dynamics of law practice and deficient as a means of advancing professional standards in law. Courses in law need a rationalized foundation.

In practice, law courses are often poorly structured; they overlap with one another in substance and in content; they frequently lack a systematized base. One solution is to teach fewer courses in our law schools, so reducing the overlap between them, and also eradicating those subjects which are deemed to be least significant or most repetitive. This systematization process can be achieved in various ways: through the analysis of course content on a piecemeal basis, by means of course clustering and by streaming courses in accordance with their educational relevance.

The piecemeal examination of law courses requires a close study of individual courses, their nature and content, and in particular, their relevance, vis a vis other courses and the educational design of the law school as a whole. Relevant questions include: what issues or topics does each course address; are such topics or issues dealt with in other courses and how important are such issues and topics in and of themselves--and in relation to the educational design of the overall curriculum? For instance an "advanced" course in property law may be deemed to add little to the educational framework of the school, where that course displaces or otherwise overlaps with other introductory and advanced courses in property.

Course clustering is the next stage in the process of curricular examination. At this stage of reform, courses are integrated within groupings: in substantive law categories, like family law, in special skills categories, like negotiating and drafting clusters or in practice-oriented categories, like clinical law. The goal is to determine the relevance of each course grouping in relation to the curriculum at large and thereafter, the value of components in each category. Thus in a commercial law cluster, the absence of a commercial drafting component might lead either to the creation of a commercial drafting course or to the integration of drafting exercises within the existing cluster of commercial or alternatively, drafting courses. So too, the absence of experience in the interpretation of documents within existing law clusters may give rise to a new cluster of courses devoted to interpretation itself, or an interpretation component may be added to existing clusters. Clustering therefore has this advantage. It creates a hierarchy of needs within law school programs. In so doing, the present haphazard and piecemeal evolution of law courses, is replaced by a process of logical assessment.

Nevertheless, the clustering and refinement of syllabi does introduce its own distinctive pitfalls. How is clustering to take place; what clusters are to be chosen; and how are law courses to be integrated within such clusters? Even more problematic, what educational goals should underlie this clustering methodology?

Courses clusters do need guidelines. Clusters can be devised on numerous bases: within substantive or adjectival courses, as theoretical or practical subjects, with emphasis on descriptive or analytical content; and with diverse social-economic and political ends in mind. Thus a cluster can have a multiple design: to train aspirant lawyers in a particular legal area, such as contract law; to provide information about contract law; to teach the rules and principles of contract law; to train students in the techniques of negotiating, drafting and interpreting contracts and to teach aspirant lawyers how to analyze the law of contracts and how to apply that law within theoretical and practical contexts. The cluster itself may consist of several or many courses in contract law, depending upon the nature, qualifications and interests of faculty and students, the number of existing courses within the cluster, the needs of competing clusters and the overriding educational design of the law school. For instance, courses on drafting or interpreting contracts may be omitted from the contracts cluster owing to the existence of alternative clusters devoted specifically to drafting or interpreting. The nature and content of each cluster therefore varies in accordance with the form of other clusters. No one cluster is immutable; no one cluster subsists for all time; all are interdependent; all require periodic review.

Legal education presupposes a rationalized basis. The educational design mentioned above is one alternative; there are others. Yet course cohesion is necessary in the interests of educational viability. To deplete this cohesion in the interests of an alleged academic freedom is to overstress the freedom of the teacher at the expense of the collective design. To do so is to institutionalize choices of individuals in disregard of our communal responsibilities as educational facilities.

Conventional Realities

The path towards professional competent education lies, to some extent, in appreciating the multiple roles of lawyers today. The stereotyped all-knowing, all-seeing and all-hearing legal practitioner who can deal with all legal matters, no matter how complex or diverse in nature, is a myth. To perpetuate the myth is to ignore the realities of modern practice. It is to forget that lawyers are engaged in diplomatic and civil functions, in commerce and industry, in public and in private legal practice. To train lawyers to fulfill multiple functions without distinction as to skill and interest, is to disregard the diversity of legal talent and the demand for a versatile legal profession. To unify our educational system into a confining mold is to stress superficiality at the expense of in-depth training in law.[22]

Inevitably, the development of professional competence in law will be determined by those who teach, practice, and adjudicate in the profession. How proficiently and ethically individuals conduct their legal affairs will depend on individual and collective moral concerns, social values and self-respect itself. We cannot train the flagrantly unethical to be ethical. We cannot mold the inherently immoral into the indisputably moral. Certain evils that exist in society and in man cannot be resolved through legal education, professional example or even the threat of punishment. Yet individual malfeasance is a collective responsibility. It is a duty which is borne by the educational and professional institutions that train individuals, that scrutinize their conduct and regulate their non- or malfeasance.The duty to provide society with competent lawyers rests to a noticeable degree with law schools. They serve as chronological and institutional fathers; the professional is the product of their diligence and their involvement in the furtherance of legal knowledge. However, the duty to train is an ongoing and mutual function; it rests with the Bar and the Bench; it is never-ending.

The training of lawyers cannot evolve without reflecting upon the evolution of society itself. Methods of legal education should embody, not gainsay, social interests. Educational programs should maximize, not minimize, community concern. To fulfill educational goals a synthesis is needed to link social behaviour to a legal understanding of that behaviour. A scientific approach is required that fosters not only legal advance but the educational embodiment of that advance.

Conclusion

The search for professional competence in legal education is a journey down a long and winding road, filled with intersections and overpasses, detours and distractions. Yet, it is a route that should be followed if our educational system is to respond to public demands for a competent legal profession. Any progress along the pathway is a formidable task, but the risk of inertia is damning. No branch of the legal profession is excluded from this journey; our responsibility to promote professional competence is interdependent. Together, we, as a profession, travel along the same pathway. Together we attain our communal ends, or fail.

FOOTNOTES

1. See Code of Professional Responsibility, A.B.A., Canon 6, entitled: "A Lawyer Should Represent a Client Competently." The Model Rules of Professional Conduct, drafted by the Commission on Evaluation of Professional Standards of the American Bar Association, defines competence as: the "specific legal knowledge, skill, effeciency, thoroughness, and preparation employed in acceptable practice by lawyers undertaking similar matters" (Rule 1.1, Discussion Draft, Chicago, Jan. 30, 1980) The Code of Professional Conduct of the Canadian Bar Association provides as follows: "Rule (a) The Lawyer owes a duty to his client to be competent to perform the legal services which the lawyer undertakes on his behalf (b) The lawyer should serve his client in a conscientious, diligent and efficient manner and he should provide a quality of legal service at least equal to that which lawyers generally would expect of a lawyer in a like situation." Code of Professional Conduct, C.B.A., ch. 2 Pp. 4-6, 1974.

2. It should be noted that competence in law is usually defined more in relation to "performance" than "capacity." See A.B.A. Code of Professional Responsibility, E.C. 6-1 to 6-6. However, "capacity" still remains an intrinsic preliminary question in determining questions of performance. For example, The Conference on The Quality of Professional Services, C.B.A., postulates that "1. The Conference accepts the definition of "competence" as the state of having the ability or qualities which are requisite or adequate for performing legal services undertaken, *and it accepts the definition of "incompetence" as the state of lacking the ability or qualities which are requisite or adequate for performing legal services. ..."* (Italics added). In terms of this definition, the lawyer's "ability" is envisaged as a requisite to his "performance." In fact, this need not be so, and often is not so. The lawyer's absence of performance may well arise due to his overwork or overcommitment even though he is otherwise most able.

3. The "attributes" of competence, as defined in both The Code of Professional Responsibility of the A.B.A. and The Code of Professional Conduct of the C.B.A. are distinctly broad in character. Consider, for example, the "commentary" on competence in the code of the C.B.A.:

> 1. Competence ... has to do with the sufficiency of the lawyer's qualifications to deal with the matter in question and includes knowledge and skill and the ability to use these effectively in the interests of the client.

2. As a member of the legal profession, the lawyer holds himself out as knowledgeable, skilled and capable in the practice of law....
3. It follows that a lawyer should not undertake a matter unless he honestly believes he is competent to handle it...." (Ch. 2, Pp. 4-5, 1974)

These "comments" raise questions of both nature and degree. How much "knowledge and skill" should the lawyer possess in practicing law? What are the perimeters of his or her "capacity" to provide legal services? How do we decide when a lawyer is entitled or justified "to believe [that] he is competent to handle" a legal matter? The Code of Professional Conduct of the C.B.A. does not answer these questions.

4. For critical commentary hereon, see Brunis, Incompetence of Defense Counsel in Criminal Cases, 16 Criminal L.Q. (1974); Burger and Barnett, Rx for Continuing Education: Lawyer, Examine Thyself, 59 A.B.A. Journal 877 (1973); Rosenthal, Evaluating The Competence of Lawyers, 11 Law and Soc. 257 (1976); Allen, Causes of Popular Dissatisfaction with Legal Education, 62 A.B.A.J. 447 (1976); Fromson, Let's be Realistic about Specialization, 63 A.B.A.J. 74 (1977); Morgan, The Evolving Concept of Professional Responsibility, 90 Harv. L. Rev. 702 (1974); Carrington, On the Pursuit of Competence, 12 Trial 35 (1976); Reiter, Discipline as a Means of Assuring Continuing Competence in The Profession, paper 11, Professional Organizations Committee, Ontario (1978); Kelso and Kelso, The Future of Legal Education for Practical Skills: Can The Innovation Survive? Brigham Young Un. L. Rev. 1016 (1977); Frankel, The Search for Truth: An Umpireal View, 123 U. Pa. L. Rev. 103, (1975); Carrington, The University Law School and Legal Services, 53 N.Y. U. L. Rev. 402 (1978); Swan, Continuing Education and Continuing Competence (1979); Selected Checklist of Materials on Specialization, 34 Record 441 (1979).

5. See Kelso, The Duty to Deliver Competent Counsel, Panel Discussion, 30 Un. Miami L. Rev., 847 (1976); Puffer, Specialization--A New Legal Direction: Good for Old Lawyers--Bad for New ones, 3 Barrister 1:57 (1976); Harrison, What Now for Lawyers, New Law J. 276 (1975); Wolkin, More on a Better Way to Keep Lawyers Competent, 61 A.B.A.J. 1064 (1975); Yegge, Tomorrow: The Future Role of the Lawyers, 29 Louisiana L. Rev. 640 (1969); Anderson, Education, Competence and Quality of Service, Appendix B2, Pp. 85-115, in The Legal Profession and the Quality of Legal Services, Ontario (1978); Report of the Special Committee on Competence, Manitoba, Appendix D3, Pp. 350-5, in The Legal Profession and The Quality of Legal Services, supra in note.

6. On the relative dimensions of professional competence in law, see in particular Allen, New Anti-Intellectualism in American Legal Education, 28 Mercer L. Rev. 447 (1976); Clare, Incompetence and The Responsibility of Courts and Law Schools, 50 St. Johns L. Rev. 463 (1976); Esau, Specialization and The Legal Profession, 9 Man. L. J. 255 (1979); Cramton, The Hired Gun or the Social Engineer, 4 Learning and L. 18 (1977, no. 3). See further supra note 5.

7. See, supra note 5.

8. See further Duncan, Public Access to Law in the 1980's, 44 Sask. L. Rev. (1980); Fraser, Recent Developments in Legal Education: The Victoria Experience, 13 U.B.C. Law Rev. 224 (1979); Carrington, The University Law School and Legal Services, supra note 5.

9. Detailed discussions hereon are contained in Arthurs and Verge, The Future of Legal Services (1973), 51 Can. Bar Rev. 15; Colvin, Stater, Taman, Yale and Zemans, The Market for Legal Services; Paraprofessionals and Specialists (1978); Christenson, Lawyers for People of Moderate Means (1970); Curran and Spalding, The Legal Needs of the Public, A.B.A.-A.B.F. p. 63 (1974); Thomason, What the Public Thinks of Lawyers, 46 N.Y.S.B.J. 151 (1974); R.L. Rabin, Lawyers for Social Change: Perspectives on Public Interest Law, 28 Stan. L. Rev. 207 (1976); Bauer, On Producing Intellectual Giants and Moral Midgets, Learning and L. 12 (1975, no. 2).

10. See in general *supra* n.9.

11. The regulation of the legal profession by the profession itself has been the subject of numerous studies to date. See, *inter alia*, Reiter, Discipline as a Means of Assuring Competence in the Profession, *supra* note 4; Anonymous, Professional Discipline of Solicitors in England, 75 Mich. L. Rev. 1732 (1979); Frankel, Curing Lawyers' Incompetence: Primum Non Nocere, 10 Creighton L. Rev. 613 (1977); Miller, Justice Report on Complaints against Lawyers, 33 Mod. L. Rev. 542 (1970); Steele and Nimmer, Lawyers, Clients and Professional Regulations, 3 A.B.F. Research J. 917 (1976); Wolkin, On Improving The Quality of Lawyering, 50 St. John's L. Rev. 523 (1976); Parker, Periodic Recertification of Lawyers: A Comparative Study of Programs for Maintaining Professional Competence, Utah L. Rev. 463 (1974); Brickman, The Education and Licensing of Lawyers: Current Proposals to Improve the Competence of Lawyers, *in* Conference on Education and Licensing of Lawyers (Florida, 1976); Redlich, Lawyer Education and Certification: Flawed Premises and Uncertain Results, *in* Conference on Education and Licensing of Lawyers, *supra* in note; Gilbreath, Maintaining Competence Among Lawyers: How Far Have We Come, 24 Catholic Law 162 (1979).

12. Mandatory legal education has been given particular stress over the course of the last decade. See, in particular, Byron, Mandatory Continuing Legal Education in Minnesota, 54 Mich. State Bar J. 361 (1975); Byron, Mandatory Continuing Legal Education in Minnesota: The First Year, 50 St. John's L. Rev. 512 (1975); Clark, Report of The Task Force on Mandatory Continuing Legal Education in Ohio, 3 Ohio Northern Un. L. Rev. 915 (1976); Hardy, Continuing Legal Education in Kentucky: A Mandatory Plan, 40 Kentucky Bench and Bar 10 (1976); Leet and Loeb, Continuing Legal Education: Should it be compulsory? 27 J. Legal Ed. 110 (1975); O'Donnell, Compulsory Continuing Legal Education: Periodic Recertification of Lawyers, 62 Women Law J. 20 (1976); Sheran and Harman, Minnesota Plan: Mandatory Continuing Legal Education for Lawyers and Judges as a Condition for The Maintaining of Professional Licencing, 44 Fordham L. Rev. 1081 (1976).

13. On a critical evaluation of the articling system, as a post law school experience, see *infra* note 15.

14. On the bar examination and subsequent assessment of competence, see Brickman, The Education and Licensing of Lawyers: Current Proposals to

Improve the Competence of Lawyers (C.L.E.P.R., Florida, 1976 cited *supra* note 11; Redlich, Lawyer Education and Certification: Flawed Premises and Uncertain Results (C.L.E.P.R., Florida, 1976, cited *supra* note 11; Covington, The Multistate Bar Examination (C.L.E.P.R., Florida, 1976), Pincus, Clinical Training in the Law School--A Challenge and a Primer for the Bar and Bar Admission Authorities, 50 St. John's Law J. 479 (1976).

15. The articling system as it relates to professional competence has been extensively criticized in recent years. The criticism has assumed two dissimilar directions. Firstly, there is the view that the articling system requires increased supervision, direction and control. Secondly, and somewhat more vehemently, there is the suggestion that the articling system should be abolished *in toto*. As to the first alternative, The Special Committee on Competence of The Law Society of Manitoba in 1977, recommended that "7. [c]lose liaison be mantained between the administration of the bar admission course and the principals [i.e., supervising lawyers] to ensure that students are obtaining the best possible practical experience. 8. Lawyers in whose offices students articled should be encouraged to take an active role in teaching their students. 9. The bar admission course be used to reinforce a student's office training where his experience in his office does not meet the minimum criteria for practical legal training (s.C. 7-9, Articling). Regarding the second criticism, namely abandonment of articles, Professor Anderson writes: "even the one year of postgraduate apprenticeship now commonly required is of a length and cost disproportionate to its benefit, that experiences in articling vary widely in range and quality, that a growing number of articling positions are seriously deficient in the breadth and order of experience and the quality of instruction and supervision they provide, and that in some instances the students see mediocre or even poor practices that in turn they may adopt and perpetuate." See D. T. Anderson, "Abolishing Service under Articles of Clerkship", *in* Conference on the Quality of Legal Services, Part 2, VI 2 (1978).

16. See *supra* note 14.

17. cf. notes 4 and 7 *supra*. In particular, see A Dialogue: Theoretical versus Practical Legal Education, 2 U. Dayton L. Rev. 1 (1977), Cramton & Jensen, The State of Trial Advocacy and Legal Education: Three New Studies, 30 J. Leg. Ed. 253 (1979); Carrington, The University Law School and Legal Services, *supra* note 7; Frankel, The Search for Truth: An Umpireal View, 123 U. Pa. L. Rev. 1031 (1975); Kelso, The Duty to Deliver Competent Counsel, Panel Discussion, 30 Univ. Miami L. Rev. 847 (1975-76); Clare, Incompetence and The Responsibility of Courts and Law Schools, *supra* note 4; Allen, Prospects of University Law Training, 63 A.B.A.J. 346 (1977); Bridge, Academic Lawyer: Mere Working Mason or Architect?, 91 L.Q.R. 488 (1975);

18. See in general *supra* note 17.

19. On these complex questions, see Boyer and Cramton, American Legal Education: An Agenda for Research and Reform, 59 Cornell L. Rev. 221 (1975); Keeton, Tell Me, Show Me, Involve Me--Establishing a Framework for Learning, 2 Learning and L. 16 (1976); Vernon, The Expanding Law School Curriculum Committee: The Move by Courts and the Organized Bar to Control Legal Education, 1 J. Leg. Prof. 7 (1976); Auerbach, As Lawyers Multiply Civilization Decays, Learning and L. 10 (no. 2 1977); Benthall-Nietzel, Empirical Investigation of the Relationship Between Lawyering Skills and Legal Education, 63 Ky. L. J. 373 (1974-75); Rohan, Legal Education and Training for the Profession: An Overview, 50 St. Johns L. Rev. 494 (1976).

20. See Stevens, Democracy and The Legal Profession, 3 Learning and L. 12 (no. 3, 1976); Carrington and Conley, Alienation of Law Students, 75 Mich. L. Rev. 887 (1977); Weinstein, Economic Scarcity as a Threat to Academic Freedom, 3 Learning and L. 29 (no. 4, 1977); Botein, Reflections on The New Humanism in Law, 22 Wayne L. Rev. 1295 (1976); Frankel, Humanist Law: The Need for Change in Legal Education, Utah L. Rev. 39 (1976); Katz and Denbeaux, Trust, Cynicism and Machiavellianism Among First Year Law Students, 53 J. Urb. L. 397 (1976); Mindes, Forcing an Identity Crisis on Law Students, 2 Learning and L. 44. (1975, no. 3).

21. But cf. Seymour, Current Trends in Legal Education and The Legal Profession--An Advocates View, 50 St. John's L. Rev. 434 (1976); C.L.E.P.R., Law School Teaching Clinic: Plans and Pictures (N.Y., 1977); Gould, Law Schools Can Teach Courtroom Skills, N.Y.L.J. 1 (1976); Oleck, Adversary Method of Law Teaching, Summarized, 27 J. Leg. Ed. 86 (1975).

22. In general, see Legal Education in a Changing World (Int'l. Law Centre, N.Y., 1975); Reed, Present Day Law Schools in The United States and Canada (N.Y., 1976); Symposium: Law in the Future: What are the Choices? (1976), 51 Calif. St. B.J. 276; Auerbach, Unequal Justice: Lawyers and Social Change in America (N.Y., 1976); Horowitz, The Jurocracy; Government Lawyers; Agency Programs; and Judicial Decisions (Mass. 1977); Meyers, Education of Present and Future Lawyers in Law and The American Future 179 (N.J., 1976); Whitmore, Are the Needs of the Community for Legal Services being met by our Universities?, 49 Aust. L. J. 315 (1975); Galinson, Interviewing, Negotiating and Counseling, 27 J. Leg. Ed. 352 (1975);

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PART I

1. Introduction

Professor Francis Allen states succinctly the problem which faces academic lawyers in these times of rapid and dramatic change:

> ... law schools in Canada and the United States are undergoing an identity crisis as they attempt to provide broad interdisciplinary and humanistic education and, at the same time, meet the demands for training in legal skills.[1]

The problem is not new. The statement simply reflects the harsh reality of Canadian legal education: the natural tensions which result from the interdependence of university programs in law and the later processes of admission and continuing education under the jurisdiction of governing bodies. But in describing the situation as a "crisis" Professor Allen emphasizes the fact that a point has been reached where action is required.

It is my opinion that the crisis has been brought about, in large measure, by the increasing concern of members of the public, representatives of government and the leaders of the legal profession about the level of competence in the provision of legal services. This paper explores the development of this concern and the resulting actions and reactions with a view to determining some of the implications for university legal education and academic lawyers.

2. What is Competence?

One of the most difficult aspects of the problem is to define "competence." Although there have been numerous thoughtful attempts at a definition, there is, as yet, no agreement in the Canadian context on a concept of competence which might serve to measure and determine the responsibilities of the individual lawyer, the university and the legal profession in the educational process.

It may be helpful to refer to some of the proposed definitions. In Manitoba, the legal profession agreed upon the following:

> Competence is the demonstrated capacity to provide a quality of legal service at least equal to that which lawyers generally would reasonably expect of a lawyer providing the service in question."[2]

The Federation of Law Societies has played a major role in bringing together members of the legal profession to consider competence, its causes, the means of identification and a range of solutions. The Conference on the

Quality of Legal Services,[3] which was organized by the Federation, provided this statement:

> ... the Conference accepts the definition of 'competence' as the state of having the ability or qualities which are requisite or adequate for performing legal services undertaken, and it accepts the definition of 'incompetence' as the state of lacking the ability or qualities which are requisite or adequate for performing legal services. A lawyer is competent if he has the demonstrated capacity to provide a quality of legal service at least equal to that which lawyers generally would reasonably expect of a lawyer providing the service in question. The words 'demonstrated' and 'reasonably' must be liberally interpreted so that any review of competence will take into account all circumstances especially those of new graduates and of practitioners in small centres.[4]

A more detailed application of the definition was considered at the Workshop on Legal Services in 1980.[5] Professor Neil Gold, in a paper delivered at that Workshop, drew upon the experience in the United States to provide a definition of competence in the context of the educational process. He proposed a classification of the elements of competence under the following categories:

1. Abilities Necessary for Competence:

   Herein the basic intellectual, emotional or physical capacities to learn, manage and carry out lawyering tasks.

2. Attitudes Necessary for Competence:

   Responsible, diligent, open-minded, considerate of others, committed to quality services and interested in the social, economic and human implications of his or her work.

   The competent professional is keen to learn about the law and its related disciplines and is motivated to carry out continued self-education.

3. Values Necessary for Competence:

   A keen sense of personal and professional ethics including respect for other persons and their views and opinions is the hallmark of the competent professional. Incompetence has been described as a failure to meet the requisite ethical standard of professional responsiblity. Integrity and honesty, conscious vigilance concerning the promotion of just laws, procedures, practices and results.

4. Knowledge Necessary for Competence:

In this context, knowledge includes substantive knowledge, comprehension, application, analysis, synthesis and evaluation. To quote Professor Gold:

> The competent lawyer must not only know rules, theories, practices and procedures, he must most often understand their meaning and their derivation. He must be able to apply knowledge to new, similar or analogous situations. The lawyer must be able to analyze problems, doctrine, theory and concepts and reduce them into their individual elements and see patterns in structure apparent only after the analysis is complete. He must also be able to carry out the reverse process so that he can combine individual elements in such a way as to be able to create a pattern not clearly visible before. Finally, the lawyer must exercise effective evaluative powers. This includes making judgments about the usefulness of certain rules, practices or procedures. It also includes being able to test the logic of arguments and reasons for judgment. The lawyer must be able to compare alternative approaches and choose among them. Included, of course, is the concept of predictive judgment.

5. Skills Necessary for Competence:

The development of a myriad of organizational, management, writing, oral and research skills. Under this heading Professor Gold includes what he calls "complex interpersonal skills."[6]

Professor Gold argues that this analytical framework gives a description of those elements which, when synthesized, provide a portrait of the competent lawyer.[7]

It is not within the scope of this paper to review the many studies on competence which have taken place recently in the United States.[8] It is sufficient for our purposes to refer to a recent report of a Task Force chaired by Dean Roger Cramton[9] which proposed that the components of lawyer competence are:

1. certain fundamental skills

Abilities to:

- a. analyze legal problems;
- b. perform legal research;
- c. collect and sort facts;
- d. write effectively;
- e. communicate orally with effectiveness in a variety of settings;

f. perform important lawyer tasks calling on both communication and interpersonal skills;
    i. interviewing
    ii. counselling
    iii. negotiation

g. organize and manage legal work

2. knowledge about law and legal institutions.

3. ability and motivation to apply both knowledge and skills to the task.

The Task Force also argues that the notion of competence

> must be expanded to include elements of character and professional responsibility in order to comprehend most of the factors necessary to assure an adequate level of professional service. Technical virtuosity does not translate into the routine rendition of high quality professional service unless it is disciplined and controlled by proper attitudes, work habits, and values.

If the governing bodies and the universities can agree upon a framework such as that proposed by Professor Gold, I would suggest that the next step should be to use the framework and the constituent elements to determine at what stage and in what manner a lawyer should acquire the various components of competence. This would lead one directly to an examination of the educational process from the commencement of the first year of law studies to participation in advanced programs of continuing education.

3. Identification of Incompetence

Both the Federation and the Professional Organizations Committee considered the means by which incompetence may be identified. There is very little hard data to provide a profile of incompetence in the legal profession in this country. Some preliminary work has been done in analyzing information received from insurance carriers and the proceedings of disciplinary tribunals, but research must be undertaken to provide more useful information. Who is incompetent? In what areas of practice? With what educational and professional backgrounds? Over what period of time? These and other questions must be addressed.

The major sources, real and potential, for the identification of potentially incompetent situations are:

1. Clients who make official complaints or launch lawsuits;
2. disciplinary proceedings;

3. insurance carriers;
4. law office management consultants, practice advisory services, and persons involved in peer review;
5. partners, associates and other lawyers;
6. members of other professions who work with lawyers, for example, accountants;
7. members of the judiciary and administrative tribunals.[10]

The Federation Workshop considered a range of strategies for "policing incompetence" but for the purposes of this paper, it may be useful to refer to two recommendations in particular:

1. it is recommended that, to supplement the deficiencies of a system based entirely on clients' complaints, the law societies advise their members that there is a responsibility upon a lawyer to notify the law society of circumstances which indicate serious incompetence upon the part of another lawyer;

2. without suggesting that an attempt should be made to impose an obligation upon judges and without recommending that judges should be asked to testify in proceedings relating to lawyers' competence, the Workshop suggests that the law societies ask the Bench to assist as follows:

   a. by directing that transcripts of trials and hearings and copies of documents embodying inadequate legal work be sent to the appropriate law societies;
   b. by participating in joint committees relating to lawyers' competence, which committees might be a channel for communication about cases which show a pattern of incompetent behaviour on the part of particular lawyers, and
   c. by advising the law societies in general terms about practices which they observe which result in inadequate legal services.

The objectives are clear: to assist the governing bodies in dealing with cases of apparent or actual incompetence. However, the recommendations themselves raise the serious questions of professional responsibility and, in particular, the proper role to be played by judges in these matters.[11]

4. Causes of Inadequate Service

Although the Workshop emphasized the need for further detailed research on the causes of incompetence, two sets of causes of inadequate services were identified.

It was agreed that the immediate causes of inadequate services in particular matters are:

1. the lack of competence of the lawyer who renders the service and in particular

a. the lawyer's lack of knowledge of law or procedure
b. the lawyer's lack of sound professional judgment (i.e.,his inability to arrive at a proper decision)
c. the lawyer's lack of skill (e.g., lack of skills of research, drafting, negotiation and advocacy)
d. the lawyer's lack of proper support systems (e.g., the lack of systems of delegation, supervision and office systems generally)
e. the lawyer's lack of diligence.

The Workshop considered lack of sound professional judgement to be an important cause of inadequate service and it considered lack of ability to recognize the limits of competence to be an important example of lack of sound professional judgment.

The Workshop agreed that the following are more fundamental causes:

a. the lawyer's lack of diligence
b. the lawyer's lack of capacity (e.g., lack of the capacity to learn and understand the law, lack of the capacity to acquire skills, or the lack of capacity to acquire sound professional judgment)
c. the lawyer's lack of education, training or information
d. the lawyer's lack of experience
e. the lawyer's lack of intellectual, emotional or physical capability (e.g., disablement due to addiction to alcohol or drugs or due to age).

Lack of diligence appears in both the list of immediate causes of inadequate service and the list of more fundamental causes.

In more general terms, the Workshop identified some other major factors which were the root causes of existing problems:

1. Economic pressures

The failure of some lawyers to resist economic pressure upon them is an important cause of inadequate legal services. Some lawyers undertake more work than they can properly do, or undertake work which they are not competent to do; some act for more than one party in a transaction thus raising a conflict of interest situation; some engage in business enterprises which conflict with the proper discharge of their responsibilities; and some work at a fee which is so low that they cannot afford to spend the time needed to do the work properly. Some are also reluctant due to economic pressures to refer clients to more experienced lawyers.

2. Changing law

The rapidity of change in and proliferation of statutes and regulations is another cause of incompetency.

3. Representation of conflicting interests

The workshop concluded that acting for more than one interest is a cause of poor legal service and recommended that law societies undertake institutional advertising to inform prospective clients of the reasons why each party adverse in interests should have independent legal advice and representation.

4. Professional attitudes

The workshop concluded that the continued development of proper professional attitudes is essential if lawyers are to cope with economic pressures and with the state of the law.

5. Competence: A Public and Professional Concern

Why has competence become an issue? What has caused members of the public, lawyers, judges, law societies and governments to place considerable emphasis on upon an examination of the ways in which a self-governing profession is discharging its responsibilities?[12] An enumeration of the major factors may be appropriate.

1. Members of the public, the individual consumers of legal services, are well educated and expect a very good quality of professional service.
2. Legal services are now available to a larger segment of the public than ever before. The lawyer participates in an ever-increasing range of professional tasks.
3. The legal profession does not suffer from a conspiracy of silence. Lawyers are prepared to advise clients to sue in malpractice actions and to take disciplinary proceedings where such are appropriate.
4. Competence has become a topic of increasing interest to academics with the result that there has been an increase in scholarly writing on the problems and possible solutions.
5. The courts have responded to individual instances of incompetence by expanding or developing the concepts of law which are applicable. The judicial hand has opened the door to increase the liability of professionals who make mistakes.[13]
6. The private citizen and the politician have been encouraged to examine professional incompetency by the press and the electronic media in reporting upon similar developments in the United States.
7. In the eyes of many members of the public, the legal profession has failed, at least until recently, to deal effectively with cases of malpractice, incompetence, fraud and related matters. This perception has

encouraged politicans and governments to investigate and inquire into affairs of the self-governing professions. The principle of public accountability of the professions has acquired a political dimension.[14]

8. The increase in numbers in the practicing bar has sharpened competition and has caused, according to some, a lowering of professional standards.[15]

9. Judges comment publicly and more frequently about the performance of counsel. These comments are frequently given prominence in press reports.

10. The increasing complexity of the law and the demands of practice pose major problems for professionals who must keep abreast of developments.

11. Access to lawyers, knowledge of rights, the existence of insurance coverage, changing and more negative attitudes towards the professions, and the general economic circumstances (mistakes are more costly!) have combined to produce a more litigious society in which resort to legal proceedings is no longer an extraordinary measure.

PART II

1. The Response

Professional organizations and individual lawyers have responded with creativity and energy to demands for increased competence and better procedures to identify and deal with the incompetent.

Whether motivated by the threat of government involvement in the legal profession, economic survival, competition, apprehension of loss of earnings, pride in one's profession and one's work, or a sense of accountability to the public, the results have been impressive. Research has been undertaken, committees have been established, procedures have changed, legislation has been passed and a host of specific measures implemented.[16]

Within the legal profession, the work of the Federation of Law Societies in Canada is noteworthy. With the assistance of the Canadian Bar Association and other institutions, the Federation convened a National Conference on the Quality of Legal Services and followed up with a Workshop on Legal Services.[17] These proceedings brought together representatives from all parts of the profession to study and make recommendations with respect to the maintenance and improvement of competence. The research paper prepared for these meetings are in themselves remarkable in quality and perspective.

As a result of these deliberations, proposals were circulated to law societies and, in many instances, concrete action was taken by the individual governing bodies.

The Federation referred to the Directors of Continuing Legal Education a series of questions: The continuing legal education agencies are asked to advise the Federation of Law Societies at its next meeting:

a. whether continuing legal education could do more to improve the competence and diligence of lawyers without losing its attractiveness to lawyers and without undue increase in cost;
b. if so, what steps might be taken to achieve that objective;
c. whether research and analysis could provide guidance for the future organization and operation of continuing legal education and, if so, who should undertake the responsibility for it.

12. The workshop asked the agencies to consider and report to the Federation on what continuing legal education agencies might contribute to remedial programs for lawyers who had provided incompetent service and whose incompetence might be remedied by continuing legal education and requested that the report also consider the aspect of incompetence that has to do with attitude and motivation.

The Directors responded thoughtfully and swiftly. In thirty recommendations, they outlined programs of education and research which are designed to deal with competence/incompetence in the immediate future and over the long term.

For our purposes, the recommendations may be grouped as follows:

1. Research Proposals--the Directors proposed that funding be sought for a number of major research projects including: a project to define the standards against which lawyers' activities may be measured to determine competency; a project to provide direction in new methods of teaching and the development of programs to train instructors; an analysis of information from insurance carriers, loss prevention offices and discipline and conduct committees; a profile of the Bar; research on the ongoing educational needs with a view to designing an overall educational curriculum; consideration of means by which other professions deal with remedial Continuing Legal Education; development of self-study methodologies; evaluation of CLE programs; etc.

2. New Emphasis and New Courses--the Directors recommended that more consideration be given in CLE programming to professional responsibility, a deeper understanding of the policy issues and values inherent in the law, working habits and personal habits which affect competency, and further development of skills.

3. Methods of Delivery--a series of recommendations concerned the manner in which CLE programs should be developed and delivered in the next few years.

The Federation and individual law societies are now responding to these recommendations.

The activity has not been restricted to the legal profession. In 1980, the Attorney-General of Ontario received the Report of the Professional Organizations Committee (The Leal Committee) which had been appointed in 1976 to conduct a review of the statutes governing the professions of public accounting, architecture, engineering and law. In addition to bringing forward specific recommendations, the very existence of the Committee generated interest in the roles and responsibilities of these professions in the 1980s. The research team under the direction of Professor Trebilcock produced a wealth of extremely valuable material which has stimulated writing and research.[18]

We have examined the responses of the legal profession and government. Let us now turn to the academic world.

2. Canadian Law Teachers--Who Are We?

We know little about ourselves in a professional sense. We number approximately 600 full-time teachers of law and we teach in twenty-two law faculties and departments.[19] Ideally, our faculties should include persons with a broad range of philosophies, educational backgrounds and professional experiences to produce an environment in which there is a constant clash of intellectual opinion. In reality, we continue to lose experienced and promising colleagues to practice, government service and corporate positions.[20]

We are appointed, reappointed, promoted, given tenure and awarded salary increments by an evaluation process which is based primarily upon peer assessment, with limited involvement of students and others. Our competence is judged by the application of criteria which normally apply to all academics in our universities; these criteria seek to promote and assess scholarship, teaching, administration, professional, university and community contributions. Few of us have been fired for incompetency and there are no reported cases in which law professors have been held responsible in suits for educational malpractice.

Our scholarship has increased in quantity and quality in recent years. Although there have always been among us those who are committed to the teaching and learning process, more of us see exciting opportunities and challenges in discharging our responsibilities as educators in the true sense of the word.

We are prima donnas with large egos and great gobs of sensitivity. We live to disagree and we love to disagree. The corners of our office contain unlimited supplies of swords and shields upon which are emblazoned "academic freedom."

Within months, we should know a great deal more about ourselves. In September, 1980, the Social Sciences and Humanities Research Council of Canada established a Consultative Group on Research and Education in Law.[21] Its mandate is to make an independent, nation-wide study of the state of research and education in law. Its appointment was recommended in the Report of the Commission on Canadian Studies where Canadian legal scholarship was described as seriously underdeveloped.[22] The Canadian Association of Law Teachers and the Committee of Canadian Law Deans expressed their support of an inquiry that would take account of the development of legal education in Canada over the past twenty years. Similarly, law societies, law foundations, law reform commissions and other legal organizations are seeking perspectives on legal education and research which would enable them to better define their roles and discharge their respective responsibilities. Obviously, the work of the Committee will bear directly upon a great number of issues, including competency.

The Terms of Reference of the Consultative Group are:

To examine and advise upon legal research and education in Canada, especially in relation to:

1. the discharge by law faculties of both their academic and professional responsiblities, and especially the relationship between those responsibilities;
2. the purpose, nature and quality of research in law, including its theoretical perspectives, interdisciplinary aspects, the various institutions and agencies in which it is conducted and the infrastructures (e.g., libraries) and sources of funding that support it;
3. the extent and quality of graduate education in law, including its relationship to advanced research;
4. the means by which the legal profession, university faculties and administrations, legal scholars, governments and granting institutions may encourage and improve scholarship, research and education in law in the Canadian context; and
5. any other matters which in the opinion of the Consultative Group may be necessary to discharge its mandate, or to identify for the Council more general issues which may relate to other professional disciplines.

Members of the Consultative Group and the Advisory Panel are drawn from the bench, the bar, university law faculties, government and several related academic disciplines including philosophy, history, education and political science.

The Study is not a royal commission. It is limited in resources, financial and otherwise, and its work will serve only to identify the strengths and weaknesses in legal education, research and scholarship, and to recommend strategies by which improvements and development may take place.

One of the research projects of the Study will provide what Professor Arthurs describes as "the first accurate portrait of Canadian law teachers, their work and their aspirations."

All full-time Canadian law teachers were asked to complete a questionnaire, the results of which should be available within the next twelve months. Included will be an analysis of the work experience and professional backgrounds of law professors, their academic qualifications, their research activities and techniques, assessments of available financial and library resources, research methodologies and the audience to which research is directed. There will also be information concerning attitudes towards scholarship, teaching and curriculum development.

3. Whom Do We Teach?

Although some data are available on a provincial basis, I do not have access to admissions statistics on a national basis. Recognizing the limitations, it might be useful to provide a snapshot of the admissions situation at the University of Victoria.[23]

The following points may be of interests:

1. There are approximately eight applicants for each available position.
2. Although many applicants apply to a number of law schools, it is apparent that students with good academic qualifications are rejected. This is borne out by the fact that the entering grade point average over a five year period is 3.65 on a 4.00 scale with an LSAT average of 600+.
3. Of the total applicant pool, about twenty-five per cent are female; of those who accept positions, approximately thirty-five percent are female.
4. Almost ninety percent of accepted applicants have already completed a degree and, in some cases, postgraduate work prior to coming to law school. Of those with degrees, sixty-five percent have received bachelor of arts degrees.
5. The average age of the entering class is twenty-seven to twenty-eight years of age.

The information is much too limited to provide a base from which deductions of a statistically significant nature may be made. My personal impressions of students in recent years are that they are bright, rich in worldly experience, mature, strongly motivated, competitive, serious, very concerned about the job market, conservative in course selection but critical of the educational methodologies employed in legal education.

One might suggest that the law school curricula and law school teaching methods do not come close to matching the expectations of a mature and sophisticated group of first year students. Very little research has been done to determine the impact on professional practice which will be made by graduation of older students including a large percentage of women.

The increasing tuition fees and general costs of education and the corresponding diminution of financial assistance combine to make the study of law even less accessible to certain groups in society than was the case ten years ago.

4. Accreditation

The governing bodies do not conduct a formal, ongoing accreditation of academic programs in law. The provincial law societies have adopted, with minor variations, the requirements of the Law Society of Upper Canada pertaining to the approval of law faculties for the purpose of admission of their graduates to the bar admission course. The regulations were agreed upon in 1957 and were renegotiated in 1969 to permit the development of optional and elective programs.[24] The arrangements permit law faculties the freedom to develop, with some flexibility, programs of legal education in the university setting.

It may be helpful to review the major regulations:

1. There are minimum academic requirements for applicants.

2. The program is to be of three years duration and students are required to attend on a full time basis, although there are some exceptions to this rule.

3. Instruction shall be offered regularly for approximately thirty teaching weeks each year and a student shall be under instruction for approximately fifteen hours per week.

4. Instruction must be offered regularly in twenty-five subject areas and all students must take the major basic courses in seven subject areas. Individual law societies recommend that certain courses be taken by students who intend to practice in particular jurisdictions.

5. There are also statements with respect to teaching loads, facilities and library resources.

These arrangements were the result of protracted and difficult negotiations. When agreement was reached, the terms were not received with great enthusiasm by many members of the practicing profession. However, the agreement recognizes that the first segment of legal education is the responsibility of the university and that in order to provide a rich and deep understanding of concept and theory the universities must be given great latitude in developing their programs. The agreement also reflects the trust which must exist between the practicing side and the academic side. For example, there is no attempt to monitor in detail the content of courses, the hours assigned to them, the order in which they are given, the organization of a program or the qualifications of faculty members.

From the point of view of the universities, the arrangements have worked reasonably well. In the late '60s and early '70s, elective and optional programs flourished, providing students with a broad range of topics to study and encouraging professors to pursue research and scholarly writing in important and developing subject areas.

In recent years, however, the storm clouds have gathered. The increasing concern about incompetency and the search for competency have brought about a renewed interest in and debate concerning the quality of legal education in Canadian universities.

5. Competency: Implications for Academia

What are the implications for those who teach law and for law faculties as corporate entities? How can the concern about competency be used as a positive force to enrich and develop legal edcucation? What are the responsibilities of the academic lawyer in this context? And what are the negative aspects of which one must be aware?

I suggest that the efforts of the legal profession to deal with competency can have a very positive impact on legal education. There are dangers, and I shall refer to them shortly, but I believe that the search for a higher level of competence has already been of benefit and offers tremendous potential for the future.

First, however, let me state some concerns.

There is a growing interest in the mind of the practitioner about what is going on at the law schools. This manifests itself in several ways and at different levels. It includes admissions, curriculum and the qualifications of law teachers. I shall give specific examples in a moment.

Law teachers should not be surprised to learn of these concerns. In fact they are always there creating what is described as the natural tension between the academic and the practitioner.[25] The tension comes and goes. It develops in a cyclical pattern. It is natural and right. I suggest, that as we as lawyers seek to improve competence, there should be a deepening interest in the first phase of legal education.

I should add that I do not see this concern as being limited to those who might be classified as members of the "black letter, fill-in-the-blanks, I-didn't-learn-a-damn-thing-in-law-school" group. It is shared by thoughtful, experienced practitioners who are as sensitive as any academic to the absolute necessity that a university education in law be a broad, rich and challenging intellectual experience--a voyage of discovery and not a packaged tour.

And, of course, law professors should welcome and respond to, indeed participate fully in, the inquiries and discussions about legal education at all levels.

I come to some specific examples which illustrate my concern. At the outset, let me emphasize that the inquiries and concerns are legitimate and should be welcomed. It is the procedures which give cause for alarm.

1. A law society has recently issued a preliminary report on a survey of its membership. There are some interesting responses:

    a. seventy-two percent believe that controls on the numbers entering the legal profession would be beneficial to the public
    b. eighty-five percent believe that controls would benefit the profession
    c. seventy-three percent feel that controls, if imposed, should be imposed by the law society and not the universities.

The Treasurer, in remarks accompanying the results, advises that in his recent trip about the province, opinions were expressed that the growing numbers in the legal profession would cause a lowering of the standard of professional services. The Treasurer noted that further research was being undertaken and that a committee on numbers in the profession had been appointed.[26]

No one disputes the right of the society to survey its members. However, I understand that little, if any, consultation took place with the Deans of the law faculties of that province. The implications of limiting the numbers presumably to a level less than the number of students currently graduating or applying for admission to the bar, hold very grave consequences not only for the law schools in one province, but for those in all common law jurisdictions. The implications for students and prospective students are equally important. Is there no appreciation of the ripple effect which may be triggered by unilateral action of this nature?

One might pose other questions. Is there evidence to show that the quality of service is reduced by the influx of recent graduates? Is it the recent graduates who provide services of lower standards or are there more experienced practitioners whose services may be affected by competition? The insurance claims, at least, would not support the assertion that it is younger graduates who are offering lower quality services.

Will the public interest be served by such a limitation? Is the "public" to be surveyed to determine its interest? By what means is control to be enforced? How is the quality of service affected? By slipshod work in a scramble for clients in tough economic times? Are lawyers' incomes a factor in these considerations? Are there data on the need for legal services?

2. In another province, a committee is considering the implementation of a standard examination which may be administered to all students prior to their admission to the articling program. A good idea, perhaps, but, once again, it is being considered without reference to the academic participants in the process and, probably, without a clear understanding of the possible impact upon the curriculum in a law school.

3. Another proposal emanating from the profession is that there be a review of admissions standards and policies in law schools. There are three specific suggestions:

    a. to interview all candidates for admission with a view to reducing the number of persons who are likely to be incompetent and/or dishonest.
    b. to develop a test which would seek to assess "judgment, integrity and strength of character";
    c. to employ a literacy test to eliminate those who do not possess adequate writing skills.

4. In many jurisdictions, there is a belief among many benchers that the core curriculum and compulsory courses must be expanded and, I fear, there is a likelihood of unilateral action by provincial law societies which will damage not only their relationships with law schools but will damage or destroy the concept of portability of degrees which has been a feature of the agreements over the years. In other words, the opportunities for law graduates to move across the country will be seriously affected.

These proposals are put forward as legitimate concerns by experienced practitioners who believe that such moves would increase the competency level of the practicing profession and serve the interest of the public.

How are we, as academics, to respond?

First, I would suggest that we must ensure that we are full participants in discussions which may lead to policy decisions affecting legal education. For a period of time, we thought the point had been made. Apparently, this is not the case, at least in some places. We must be seen as partners in the deliberations, not as junior associates.

Second, we should be prepared to illustrate the tremendous advances that have taken place in legal education in recent years--improved scholarship, increased research, the development of university law libraries, and changes in curriculum and teaching methods--but we should also be the first to admit that we have not achieved perfection and that we require advice, assistance and support from our practicing colleagues.

The establishment of the Canadian Law Teaching Clinic occurred three years ago through the initiative of the Committee of Canadian Law Deans with the support of the Canadian Association of Law Teachers. Financial support has come from all law faculties, several law foundations and the Bar of Québec.

In each of the past three years, a ten-day program has been conducted and over this period more than seventy-five law teachers have attended.

Time does not permit me to describe in detail the intensive programe which has been designed by the directors of the clinic. However, its very existence and its continuing success indicate the commitment of law teachers to the development of competence in educational matters.

One of the benefits has been the leadership of participants in the clinic who return to their faculties to organize workshops and seminars on legal education. The impact cannot yet be judged but there is an increased volume of activity with respect to legal education and its methodologies in most faculties in the country.[27]

This major commitment to increasing the quality of teaching is simply one illustration of the many beneficial changes which have occurred recently. As I study the reports and recommendations with respect to competency, I am struck by the number of references to the educational process--the appreciation of the contribution which can be made by the professional educator. This recognition of the fact that we as teachers possess or should possess expertise to which the practioner will look for assistance is extremely encouraging. It is recognition, in effect, that legal education is a lifetime process and that we, as teachers, have a role to play and a responsiblility to discharge in the entire process.

In the concluding part of this paper, I wish to consider some specific suggestions which are designed to improve the entire process of legal education thereby seeking to raise the level of competence of the lawyer in society. Most of the suggestions are not new. They have been raised, aired, debated, deferred or dismissed over the years. What may be important, however, is that the present concern about competency may have developed a climate in which at least some of these proposals might be implemented.[28]

6. The Grand Design

Writing about the evolution of the system of legal education in Ontario, Mr. Justice Horace Krever states:

> ... The gulf between what are perceived to be academic concerns, i.e., those of the university, and practical concerns, i.e., those that are not the university's business, continues to widen--to the disservice of the students and of society at large.

And,

> ... It is my belief that the university law schools ... are becoming less concerned about the needs of their students as future lawyers and totally uninterested, or at least uninvolved, in the process of legal education after the point at which the LL.B. degree is granted.

And, concluding his remarks on this point:

> My principal criticism lies in the absence of any integration of, or even recognition of, the need to think of integrating, the various periods of legal education as parts of a continuum or a single process, rather than as a sequence of discrete interests each having its own raison d'être and, in its performance, unconcerned with the role or performance of the other interests or parts.[29]

Mr. Justice Krever goes on to comment that the present benchers may be excellent lawyers but they do not have expertise in educational theory or practice. There follows an implicit criticism of the bar admission course and a recognition of the unevenness of the articling experience, both in quality and time. He concludes that "the institutions with the greatest potential for the acquisition of expertise in educational matters involved in professional preparation for certification are the universities."

This call for university law faculties to play a significantly increased role in legal education beyond the three-year LL.B. program may come at the right time. In the context of the discussions about competency, I suggest it is appropriate for law faculties to consider with law societies the acceptance by law faculties of major responsibility for the entire educational process. I recognize, of course, that certain policy matters would have to remain the prerogative of the law societies but the time may be ripe for serious discussion along these lines.

There are various models one might consider. A project of The Continuing Legal Education Society of British Columbia is an example of cooperative planning and action among all the organizations of the profession which have a responsibility for legal education within the province.

Three years ago Professor Donovan Waters, a senior scholar with teaching experience in a number of jurisdictions, produced an internal working paper which ultimately was adopted as policy by the Board of Continuing Legal Education Society. His basic premise was not new--that legal education should be seen as a whole from the time of entering law school to retirement from practice--but the thrust of his proposal was that the CLES should take the initiative in developing a program of legal education in which there would be substantial coordination and integration. There should be a progression from concept to practical application over the period from year one of law school to the completion of the bar admission course. Throughout a lifetime of practice, the lawyer would seek further opportunities for legal education which would increase his knowledge and skills. The proposal was designed to focus attention on the logical developments in legal education and to move away from the controversial debate over practice and academic theories.

Although there is no talk at this stage of delegating to the universities major responsibilities for the entire program of legal education, the guidelines adopted by the Society indicate the need for participation and coordination by all parties. The plan includes:

a. The provision of one or more refresher courses in basic law school subjects, such as contract, tort or criminal law;
b. the development of a procedure for common course material for CLE and bar admission by way of a pilot project in one or more subject areas;
c. drawing upon the experience with the pilot project, there should be a closer examination of the opportunities for integrating the educational roles of the bar admission and CLE programs through joint planning, courses and materials;
d. consideration of the desirability and feasibility of standardizing training and articles;
e. extending the first pilot project to include law school teaching materials with a view to determining the possibility of integrating teaching techniques and materials;
f. examination of the role of the legal profession in the training of paraprofessionals and in providing public legal education and a component of legal education in the training of other professionals.

It is too early to determine whether these proposals are realistic, but a start has been made.

Recently, the Benchers of the Law Society of British Columbia entered into an agreement with the Continuing Legal Education Society under which the Bar Admission Program will be administered by the Society, subject to the determination of policy by the Benchers. To round out the cooperative aspect of this exercise, the first full-time Director of the Bar Admission Program has been selected from the academic ranks, recognition of the fact that the educational program requires the expertise of an educator.[30]

Another model is to pursue the proposal that the universities themselves be given responsibility, again subject to direction on policy matters by the Law Society or other appropriate body, for the development and implementation of a program of legal education which would span what is now law school training, bar admission, CLE, remedial CLE: the entire educational spectrum. The process of medical education is founded upon a university-based centre directing education from "cradle to the grave." The recognition that continuing education in law requires the involvement of professional educators adds force to the argument that serious consideration should be given to adapting the medical model.

Regardless of the model, the potential for development of increased competence through a planned and coordinated program is considerable. Serious consideration must also be given to the development of a bridge between the law school academic program and practice through the concept of clinical teaching as it is presently used in the medical profession, modified to meet the situation.

I realize that cooperative arrangements exist in many provinces but what I wish to stress is that we may now be at the point where the universities can offer leadership in providing some of the solutions to some of the major problems facing the legal profession by accepting a major responsibility in the legal education process.

What benefits might accrue to the universities and to individual professors? The development of strategies which are designed to reduce and combat incompetence offers tremendous potential for substantial contributions and participation by law professors. There will be increasing demands to contribute in a scholarly way to programs of legal education outside the law school. This should be regarded as a professional responsiblity by academics but we must be careful to concentrate upon scholarly papers.

On the research side, the entire range of problems facing the legal profession--from competency to advertising to specialization--offers the academic almost unlimited opportunities to pursue scholarly writing. To take but one example, there is a growing concern, as we have seen, about problems of professional responsibility, many of which require the time and approach that an academic can devote in producing tentative solutions.

I expect that in the next few years many law societies in Canada will establish research and policy departments which will permit the members of the governing body to be prepared adequately to deal with major policy issues. It is likely that research assistance will be required from university personnel.[31]

7. Proposed Program in Professional Education

A recurrent theme in the studies into and solutions proposed to increase competence is a very deep concern about the apparent failure of the practicing lawyer to recognize and deal with problems of professional responsibility. It seems quite clear that an obvious result will be the implementation of a range of programs which are designed to increase knowledge and understanding of professional responsibility. What is equally obvious is the need for thoughtful research in the area: research which will serve not only the immediate purpose but will raise fundamental issues about the roles of the lawyer and the legal profession in the next twenty years.

As an example of cooperative planning, let me refer once again to developments in British Columbia. With the support of the Deans of the two law faculties, the Benchers have approved in principle the development of a program of professional education which will be designed, initially, to span the period from the first year of law school to the completion of the Bar Admission Program. Eventually, it is expected to lead to a more concentrated consideration of professional responsibility problems in continuing education programs. The program will enable students to appreciate, discuss, recognize and consider solutions to ethical issues and matters which touch upon the role of the legal profession in society. The fact that the program will stretch over an extended period of time will permit the development of issues in a more sophisticated manner and will enable the student to reflect upon changes in attitudes, increased knowledge and other factors which may become apparent as the student proceeds through the program.[32]

8. Curriculum and Teaching Methodologies

Over the years, curriculum debates have tended to focus almost entirely upon the issue of knowledge of substantive law. Little, if any, attention has been given to defining the law graduate in terms of the criteria developed by the Cramton Committee[33] or as proposed by Professor Gold.[34]

To apply the model adopted by Cramton Committee, the graduate may be defined in terms of:

a. fundamental skills;
b. knowledge;
c. ability and motivation.

Nor have we attempted to structure our three-year program to permit and challenge the student not only to develop a substantial body of knowledge but to acquire the whole host of abilities and attitudes, ranging from intellectual curiosity to interpersonal skills.

The curriculum, whatever its content and methodology, should permit and indeed should encourage intellectual growth and skill development progressively throughout the program. I believe we have not yet achieved this in the implementation of curriculum designs in Canadian law schools.

The move to the elective curriculum was right at the time. We should now assess its strengths and weaknesses with a view to determining what we can learn from this ten-year experience.

Dean Cramton's report suggests that there should be "greater coherence" in the curriculum. I agree. I do not suggest a standard curriculum--there are great strengths in diversity in programs across the country, but to use the language of the report, "the program should build in a structured way: to present students with problems of successively broader scope and challenge, to enable students to teach themselves, and to utilize skills and knowledge acquired earlier."

Why is it that the study of law under the direction of teachers who love the law cannot be a more rewarding, intellectually satisfying experience for more students? I do not seek a situation in which students would be totally comfortable, happy and without stress. Nor do I believe that we shall ever reach perfection as the process of education itself denies complete satisfaction with the experience of learning. Legal education requires that students become critical of their programs of study and their teachers. Fair enough! But what concerns me is that we have progressed very little in the development of teaching methods in response to boredom, repetition and lack of challenge. Or, to be more positive, we have failed to develop our methodologies to meet the expectations and abilities of the sophisticated, thoughtful students whom we teach. Are we ourselves involved in a process which breeds cynicism, assists in the development of sloppy habits, and discourages intellectual curiosity? I realize that much depends upon the student and the teacher but, as educators, I believe we have not yet discharged our responsibilities. I recognize the problems of numbers, time, and the competing commitments to other responsibilities including scholarship. But, as one reads the proposals to combat incompetency one is impressed by the emphasis on and expectation about the need for a great variety of effective educational techniques.

What do we as law teachers know about the learning process? What qualifications have we with respect to evaluation procedures? What concepts have we about education? Is there a touch of personal and corporate incompetency here?

What have we done? We have re-tuned and modified the Socratic method. Casebooks have become coursebooks. There are "interdisciplinary courses." Seminars are designed to relieve the boredom of classes. There is the lecture on the one hand and the problem method on the other. But, have we devoted our intellectual resources to the development of these methods and the creation of others? What have we learned from clinical programs? Have we applied these lessons in other parts of our curriculum?

We are not surprised to learn that the intensive nature of the clinical program, limited in numbers and concentrated in time and subject area, produces an atmosphere extremely conducive to learning. We have applied that knowledge to a limited extent in the development of what we call term or semester programs. These, again, are expensive but also very effective. They permit fifteen to twenty students to take a single term in one subject area only--criminal law, family law, public law--where learning takes place effectively and permits the instructor great flexibility in designing the program. A functional or transactional approach can be adopted easily in these circumstances as can be shown in our program at the University of Victoria in Solicitors' Practice and in the Public Law Term.[35]

We should move clinical teaching from its now traditional base in poverty law to other areas of our curriculum. In British Columbia, funding has recently been obtained to establish a Public Interest Advocacy Centre. The Centre will be staffed by lawyers who will carry out research, public legal education and appear in proceedings before courts and administrative tribunals. Arrangements will be made for law students at both universities to participate in this process which will likely involve a heavy emphasis on environmental law, administrative law, municipal law and land use planning.

There are modest moves in some law schools to develop computer-assisted teaching and learning programs. What is required is a major allocation of resources to explore the potential for the computer not as a data bank but as process of learning for the professional person.[36] The Ministry of Education in British Columbia has provided a telecommunications network which links the Vancouver courthouse to the faculties of law in Vancouver and Victoria. The potential for cooperative programming is now being explored but the very existence of the network challenges educators who are interested in new methodologies and efficient use of faculty resources. The faculties are already actively involved in the continuing legal education programs which are carried by satellite to a large number of towns throughout the province.

Other questions should be addressed. Have we examined the possibility of streaming students and courses in law schools? Do we pay attention to the impressive academic and professional backgrounds brought by our students to their law studies? Some of us are engaged in breaking away from the traditional timetable in which subjects are offered two or three hours per week for fifteen weeks. What do we know about the learning processes in, for example, a seminar of a month's duration? At the University of Victoria, we have adopted a program in Legal Process,[37] which is the only course taken by first year students for three weeks in the Fall term and then again for one week in the Spring. The success of this program over a six year period indicates the potential for similar ventures in other subject areas.

Are we making any progress in our oft-quoted goals to increase learning in skills of interviewing, counselling, negotiating, drafting and advocacy? Or are we simply playing with the idea in a very limited fashion?

Should we be, or indeed are we in fact, turning to our graduates to seek assessments of our programs? It seemed to me when we first established our law school that it would be logical to request assessments as the graduates progressed in their careers. Although changes do occur over the years, it is sensible to attempt an evaluation on a regular basis for a period of time to determine the strengths and weaknesses of a program as seen by graduates. In a more formal manner, should we seek assessments of the "products" of our law school by requesting employers, principals, partners, judges and others to provide assessments of our students?

I believe it would be appropriate for at least one faculty in this country to consider the implementation of a limited or modified trimester system. I do not propose, necessarily, that law students would spend forty-five weeks a year in the classroom. But I see the possibility of offering, for example, a summer program in which students might enrol and receive credit towards their degree. There are logistical and budgetary factors. It would require, perhaps, the graduation of students at different times throughout the year but this might ease an apparently difficult articling system. It might provide us with an opportunity to teach in small groups whilst maintaining the enrolment over the full year at the present level. If the summer program were staged, it could well be that visitors could provide some of the teaching required in the courses. I would use the clinical or term program as a starting point. A most attractive feature of a summer program would be the participation of students from all common law faculties. The potential for an enriched educational experience and an opportunity to better understand the problems facing the country are obvious.

9. Grading and Evaluation

We have made progress in devising a variety of evaluation techniques--exams, tests, orals, simulations, moots and papers. However, are we not obliged to take this a step further by providing more in the form of critical evaluation of the work of a student, not simply in a post-examination conversation? Students who enrol in clinical and some of the term programs receive a formal, written evaluation from the instructor which has proven useful not only to the student but to representatives of law firms who are interested in assessing the strengths and weakness of the candidate. At the University of Victoria, we are in the process of considering a more structured arrangement whereby professors would, in the context of the objectives of an examination or other evaluation procedure, provide a written analysis of the performance of the student. I realize the numbers problem and the demands on the time but there may be some modifications which could be adopted in larger schools.

10. Financial Resources

Legal education in its university phase has never received adequate funding. It has always been done "on the cheap". The Faculty of Law is often regarded by senior university administrators as high in status and low in cost compared with other major professional programs. A response to any of the opportunities to which I refer will require a reallocation of financial resources within university budgets which are already hard pressed in today's economic circumstances. Therefore, if progress and improvement in legal education is to occur, the leadership of the profession is absolutely essential if legal academicians are to be successful in obtaining additional funding not only from within the university but from foundations, corporations and private donors including individual members of the practicing bar.

In spite of the economic situation, we must establish our priorities and make our case for adequate funding from a position of strength.

11. Faculty Resources

If we are to move to another level of sophistication in research and teaching, we should pursue with real commitment the idea of appointing non-lawyers to our faculties. I realize that this is an old chestnut but it has been achieved in only one or two faculties. If we view the study of law in a broad perspective, it is obvious that the expertise of others must be applied in teaching and research. I am aware of the arguments about priorities on the one hand and the apparent lack of qualified candidates on the other. I suspect, however, that our lack of action is caused more by a reluctance to hurdle that barrier which still exists between law and the social sciences.

The practitioner-in-residence is now a feature in a number of law schools and I commend it as a valuable addition to faculty resources. Grants are provided by law foundations to permit practitioners to spend a full academic year at a law school. The practitioner may teach one or two courses but the major function is to participate in a selection of teaching activities, to pursue research, discuss issues with students and faculty and act as a bridge with the practicing profession.

At the University of Victoria during the past year, we adopted a variation on this theme by inviting eight senior Vancouver practitioners to participate in our Solicitors' Practice Program. Each lawyer prepared materials in advance which were coordinated by the professor in charge of the program. The enrolment is restricted to fifteen third year students and this is the only program in which they are enrolled for a fifteen-week period. Every second week a practitioner spent the five day period immersed in the program: lecturing, conducting seminars, involving students in simulations, providing individual instruction, and marking assignments. The program was extremely successful and permitted a major contribution by each person in a limited period of time. It made available expertise which could not have been obtained over a longer period of time or through one or two individuals. It was labour intensive and required a great deal of planning to be successful. The program permitted students at a small school to reach a level of sophistication in a subject area which would not have been possible in normal conditions.

12. Legal Writing and Research

Most law schools have very good programs in legal writing and research in the first year curricula. However, we seem to be stuck in first gear. There is a great need for an integrated program, probably compulsory, which would permit a student to progress in acquiring skills and knowledge over the three-year period.

I realize that in most schools "paper courses" are available and are sometimes compulsory in senior years. But, for the most part, this is a scatter-shot, hit-and-miss approach which lacks the integrity of a coordinated program.

With a little imagination, this could be made an attractive feature of a curriculum and one which would encourage students in a research direction. One other failing, in my opinion, is our general neglect in the area of instruction in social science research methodology. It is within a coordinated writing and research program that one should develop an appreciation of the research methodologies and techniques which are employed in other disciplines. This would be a valuable investment in future research and scholarly writing.

13. Centre for Studies in Canadian Legal Education

There is a proposal to establish a Centre for Studies in Canadian Legal Education. Attached to a university, a Centre would initiate and foster research and writing on legal education, act as a consultative and resource centre to legal education programs, coordinate and develop workshops, seminars, conferences and training clinics and act as liaison with various national and international bodies concerned with education.[38]

14. Conclusion

The search for ways in which to increase the competency of the practicing lawyer has generated a range of imaginative responses. In the initial phase, considerable action has taken place primarily within the institutions of the practicing Bar. Programs have been instituted. Procedures have changed. Research has been undertaken.

The second phase, which is now upon us, will involve an intense and critical examination of university based programs of legal education.

To respond to the public interest and to meet the needs of the profession, the faculties of law and the individual law professor will be required to place a much higher priority upon the processes and methodologies of learning and teaching.

It is appropriate to conclude, as I began, with a comment from Professor Allen:

> Educational policy in the law schools during the closing years of this century is likely to become increasingly pragmatic, consciously experimental. We shall have to distribute our eggs among many baskets.
>
> It seems likely, therefore, that if the law school is to flourish as part of the university, the law school must become an even more pluralistic community than it has yet become.[39]

FOOTNOTES

1. Special lecture given upon the occasion of the official opening of the Begbie Law Building at the University of Victoria, October, 1980.

2. Report of the Special Committee on Competence, The Law Society of Manitoba, 1977.

3. The Conference was sponsored by the Federation, the Canadian Bar Association and the Canadian Institute for the Administration of Justice.

4. The Legal Profession and Quality of Service, published by the Canadian Institute for The Administration of Justice, 1979, at p. 29.

5. The Workshop brought together a smaller group to develop the work of the Conference.

6. Gold, Competence and Continuing Legal Education.

7. See also, Reiter, Discipline as a Means of Assuring Continuing Competence in the Professions, 1978, a working paper prepared for the Professional Organizations Committee, Ontario, and, Code of Professional Conduct, The Canadian Bar Association, 1974.

8. See, for example, Law Schools and Professional Education: Report and Recommendations of the Special Committee for a Study of Legal Education of the A.B.A., 1980; Cramton, Lawyer Competence and the Law Schools, 4 U. Ark Little Rock L. J. 1 (1981); Conference papers on Enhancing The Competence of Lawyers, A.L.I. A.B.A. (1981); Allen, The Causes of Popular Dissatisfaction with Legal Education, 62 A.B.A.J. 447 (1976); Gellhorn, Preaching That Old Time Religion, 63 Va. L. Rev. 175 (1977).

9. The A.B.A. Section of Legal Education and Admissions to the Bar, Report and Recommendations of the Task Force on Lawyer Competency: The Role of the Law Schools, 1979.

10. See Swan, Continuing Education and Continuing Competence, 1979, a working paper prepared for The Professional Organizations Committee, Ontario.

11. There is considerable debate among judges with respect to this issue.

12. A major study on four professions in Ontario is found in The Report of the Professional Organizations Committee, 1980 and the Staff Study commissioned by that committee, authored by Trebilcock, Tuohy and Wolfson, entitled: Professional Regulation, 1979.

13. Examples may be found regularly in the major report series. Two important decisions for the purpose of illustration are: *De Marco* v.

Ungaro et al. (1979), 95 D.L.R. (3d) 385, 8 C.C.L.T. 207 (O.H.C.) and *Whittingham* v. *Crease & Co.* (1978), 88 D.L.R. (3d) 353 (B.C.S.C.).

14. See note 12 for the Ontario response; see also, Alberta, Report on the Professions and Occupations, 1973, a report of a Select Committee of the legislative Assembly.

15. The number of practicing lawyers in British Columbia has doubled in less than eight years.

16. For example, peer review systems, law office management systems, legal ethics committees, practice advisory services, legislation to deal with incompetence, have been considered and, in some jurisdictions, implemented.

17. *Supra* notes 3 and 4.

18. *Supra* note 12.

19. Directory of Law Teachers, 1980-81, the Canadian Association of Law Teachers.

20. Arthurs, Paradoxes of Canadian Legal Education, 3 Dal. L. J. 639 (1977).

21. The chairman is Professor H.W. Arthurs of Osgoode Hall Law School. The chairman of the Advisory Committee is the Rt. Hon. Bora Laskin, P.C., Chief Justice of Canada.

22. Symons, To Know Ourselves, The Report of the Commission on Canadian Studies, A.U.C.C., 1975.

23. Reports of the Admissions Committees, 1975-81, Faculty of Law, University of Victoria.

24. Lederman, Canadian Legal Education in the Second half of the Twentieth Century, 27 U.T.L.J. 141 (1971).

25. Slayton, Practitioners and Professors: The Two Solitudes of Canadian Legal Education, 14 Gazette 429 (1980).

26. Letter from the Treasurer to members of The Law Society of Upper Canada, April, 1981.

27. Report of The Director, The Canadian Law Teaching Clinic, 1981.

28. There is a wealth of writing on Canadian legal education. Let me acknowledge my debt to colleagues who have considered many of these solutions in their writings over the years. Recent contributions may be found in 44 Sask. L. Rev. (1979). See also, Gibson, Legal Education--Past and Future, 6 Man. L. J. 21 (1974).

29. Krever, A Comparative Examination of Professional Education, The W.K. Kellog Lecture, 1979.

30. Academic law teachers have held or hold similar positions in Manitoba and Ontario.

31. A law professor has been named Director of Professional Development for a large international law firm with headquarters in Chicago. The professor will be on a two-year leave of absence and will assist in the development of a variety of educational and training programs for members of the firm.

32. The Committee on Professional Education (British Columbia) is chaired by B.I. Cohen, Esq.

33. *Supra* note 9.

34. *Supra* note 6.

35. Waldron and Ellis, Report on the University of Victoria Solicitors' Practice Clinic, 37 Advocate 531 (1979).

36. There are several successful programs of computer-assisted learning in law in the United States.

37. Fraser, Recent Developments in Legal Education: The Victoria Experience, 13 U.B.C. Law Rev. 221 (1979).

38. A joint proposal of Dean John McLaren, University of Calgary and Professor Neil Gold, University of Victoria.

39. *Supra* note 1.

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I have been asked to speak about "Professional Competence and the law--What's at Stake: The Educator's Perspective." In the interest of truth in advertising and full disclosure, I must make a few things clear at the outset. Much of my knowledge about the topic comes from a study of 106 lawyers in Wisconsin.[1] I am aware that a study of American lawyers does not necessarily tell us anything about the bar in Canada. However, you are invited to take my remarks as reflecting the quaint native customs of a colorful but primitive people which might be suggestive to a Canadian audience. Moreover, while I am paid to meet classes at a law school, I could hardly claim to be representative of American law professors. This talk will be "an" educator's perspective rather than "the" view of all of my colleagues.

Our topic is professional competence. Let me make clear that I am for it, and I do not intend to advocate greater incompetence. However, my view is that the nature of the problem often is poorly defined and the proposed cures--usually some form of educational change--are likely to be far more symbolic than instrumental. I will first explore the idea of professional competence; I will then consider some of the limits of legal education as a solution to those problems we are able to identify; and, finally, I will talk about a few things which can be done inside law schools which might help.

Recalling Pirandello, Are We 70 Conferees in Search of a Problem?

In much of the current writing about professional competence, we can find a long list of sins. The more common include the charge that lawyers do not know the law, particularly the newly developing statutory fields where keeping up with developments can be a real burden. Lawyers are said to handle trials poorly in various ways. Some of the criticisms centre on poor public speaking techniques; others on trial strategy; others on the art of direct and cross examination. Lawyers are found to write poorly and lack skill in drafting legal documents of all kinds. Lawyers are seen as sloppy and careless, juggling the demands of their profession and constantly begging for continuances of proceedings.

Insofar as we find such sinners, what have we found? There are a number of possible alternative explanations: The lawyers in question may be stupid or the victims of an inadequate education, before, during and after law school. On the other hand, we may be looking at people coping with structural problems as best they can. Geoffrey Hazard has written that people go into corporate law practice because they can "give their technical best to the problems they work on." He continues, saying that the "rest of the bar ordinarily has to slop through with quickie work or, as one lawyer put it, makes good guesses as to the level of malpractice at which they should operate in any given situation."[2] If competence means Rolls Royce lawyering, then the same people who can afford a Rolls will be able to afford a competent lawyer. A lawyer for a person with limited means may have to "wing it." Such an attorney may not be able to do much legal research, fully investigate his or her case and plan direct and cross examination so as to meet an idealized model of practice. Given the amount at issue and the client's ability to pay, there are real limits on what can be done. The lawyer may have no practical alternative to filling in blanks on a form will, contract or pleading, whatever its literary quality. S/he may be able to do little more than follow the steps in a "cookbook" published by a continuing legal education program. Perhaps such second class legal service is worse than no legal service at all, but this question does not seem to be captured by labelling conduct as competent or incompetent.

Even a lawyer who could bill a client for more time invested in a case, sometimes will be ill advised to do so. Lawyers may be part of a local legal culture which rewards a "common sense" approach and penalizes "legal technicality." Judges may not be pleased with lawyers who push them into ruling on difficult legal issues such as the outer reaches of the hearsay rule or whether the federal Magnuson Moss Warranty Act authorizes particular Federal Trade Commission regulations which can or must control in a state action brought by an individual against a merchant. One younger Wisconsin lawyer told me of his experience in one of the trial courts in a smaller city in the state. The lawyer was something of an expert on Wisconsin's consumer protection laws. He based his case on several provisions of the Wisconsin Administrative Code. It seemed clear that the retailer defendant had violated the regulations and the consumer was entitled to a remedy under a literal reading of their words. Neither the opposing lawyer nor the judge had ever seen the regulations before the trial. The judge ruled for the retailer, remarking that the Wisconsin Administrative Code lacked a good index; the lawyer for the consumer had not played fairly when he raised a law which the bar in the community and the judge were unaware of.

From a client's perspective, competence may have to be defined much more broadly than is common in the literature. We, perhaps, should add several items to our list of lawyer sins, although we might debate whether we were talking about competence or ethics--a distinction unlikely to interest a client. For example, there are lawyers who litigate cases which should have been settled. Sometimes these are lawyers who lack the ability to value their case properly so that their bargaining is realistic. Lawyers who have few clients may let hope cloud their judgment or think that a trial will gain them valuable publicity. Some lawyers resemble surgeons who operate in an attempt to cure the common cold. I have been told stories of some who relish combat and disdain non-adversary more-cooperative means of problem solving. Such a litigator, while ostensibly maximizing the interests of his/her clients, may instead maximize only personal satisfaction in participating in courtroom battle.

Interestingly, a number of large corporations are beginning to attempt to control legal costs by supervising the work of elite law firms. Many of these firms long have had a standard approach to any case which features exhaustive legal research, endless pretrial procedures and large teams of expensive lawyers. The work will be a model of professional craftsmanship, but it may serve a client's interest poorly when the case does not warrant the best legal service money can buy. A policy of spending whatever is needed to deal with a law suit allows a large law firm to bill many hours and so help cover its overhead and produce profits. A policy of quick settlement may not be as advantageous to a corporation's lawyers but it may be a better resolution of the question of costs and benefits for the corporation.

Also there are lawyers who fight to defend their clients' legal rights while doing great damage to valuable relationships. One can produce a technically marvelous estate plan which minimizes the taxes due at the cost of family harmony. One can point out all of the things that might go wrong in a partnership or under a property settlement suggested by divorcing spouses and provoke warfare among the parties. One can insist on precise definitions and terms to cover all imaginable contingencies and thus make it impossible for a buyer and seller to agree to a contract. One can raise endless but perfectly valid objections to testimony during a trial and antagonize jurors who do not appreciate the finer points of legal craft. In short, at least on occasion, the highest levels of technical competence may serve a client's goals so poorly as to be incompetent practice. A client seldom needs technique itself--lawyering is not like competitive figure skating or gymnastics where judges award points for form and may even count off points for routines which impress the audience. Lawyers are hired to produce results.

We must also note the opposite sin: there are lawyers who settle cases which should have been tried or settled more advantageously for the client. These lawyers often are pursuing their own self-interest rather than that of the client--a lawyer who accepts the other side's initial offer or who only goes through the motions of bargaining does not have to invest much in research, investigation or trying the case. If such a lawyer can mass process enough cases, s/he can earn a living or even do better. This lawyer needs few skills other than the ability to persuade clients that a valuable service has been rendered. Blumberg, in a famous article, called this "The Practice of Law as a Confidence Game."[3] While we might be tempted to see selling out a client and persuading him/her to accept the settlement by misrepresentation as a problem of ethics, at least some of the time lawyers who practice this way do so because they lack the skills needed to practice differently. If a lawyer does not know how to try a case (or knows that s/he is not very good at it), it is in his/her interest to settle on whatever terms are offered or are prompted by a bluff.

Of course, even lawyers of ability may pursue the average interest of their clients as a group or their own interest rather than the desires of any one client. For example, one executive of a large corporation has complained that

> many attorneys' practice ... practice before ... administrative bodies consumes much more of their time than the time spent in litigation before the courts. It has therefore become very important to an attorney to maintain strong and close relationships with these respective agencies so that he can get informal rulings, hints as to the agencies' attitudes and other "favors". These are necessary, he believes, if he is to adequately advise

> his many clients. However, if I want to take a position that is very unpopular with the particular agency and which will almost certainly lead to litigation, I will have difficulty in getting my counsel to go along. If I am unaware that such a position can be taken, he may not suggest it to me. He fears that by serving as an aggressive advocate for my position, he may estrange himself to some extent with the members of the agency and thereby reduce his ability to serve his many other clients who also deal with that same agency.[4]

However we define competence, we lack any sense of the dimensions of the problem. How many of what kind of lawyers lack what kinds of competence? It is not easy to get any idea of a rate. A few "atrocity stories" may be vivid and shocking, but they may be very atypical. We can wonder whether judges are in the best position to observe and evaluate the performance of the bar. They can see what is going on before them, but they seldom know much about what is occurring backstage. Indeed, my colleague Marc Galanter suggests that we might need something like the "tissue committee" that evaluates operations in hospitals if we were serious about appraising the performance of the bar. One would have to sample each lawyer's cases from the first to last contact with clients, appraising decisions and non-decisions both from the point of view of the degree of legal skill displayed and the degree of service to the interests of the clients. Of course, just stating the proposal should suggest all of the problems of access, privilege and privacy one would face as well as the difficult judgments about settlement offers made, accepted and rejected, decisions about how much to invest in a case and tactics to pursue.

Moreover, we cannot assume that lawyers who do not seem very competent in one area are not serving their clients well in others. A second or third class trial lawyer may handle divorces with sympathy and understanding while the model technician may lack such qualities. One whose legal research and analysis leaves something to be desired may be just the person a client should see to help arrange a zoning variance because of the lawyer's excellent contacts at City Hall. On the other hand, an elite law firm may be almost totally incompetent when faced with an ordinary criminal case--the competent response of such a firm may well be to subcontract the job to a lawyer who knows who to see and how to plea bargain.

In at least some of the writing about competence, there is both an attack on university legal education and a proposal for new kinds of courses or teaching to cure the problems of the profession. Unaccustomed as I am to play the role of an apologist for legal education,[5] let me raise a number of quarrelsome points related to the limits of the effectiveness of this remedy. Much of this literature seems to be symbolic rhetoric rather than careful diagnosis and prescription of a remedy. Often it seems as if we law teachers are being asked to produce 25 year old superlawyers with but a wave of a magic wand. Unfortunately, the magical powers of the law schools are not very great.

A law teacher is likely to notice that proposals to change legal education in law schools avoids inconveniencing those now in the profession.

These proposals contain tacit "grandfather clauses", exempting those now in practice. Yet those now in practice are those ones who have so displeased the distinguished judges and lawyers who write about competence. Moreover, lawyers and judges do not pay for training the newcomers eager to join the profession. At least some of these proposals are pleas for a larger subsidy from taxpayers and private donors who fund law schools.

We must recognize that almost all of the lawyer-competence proposals which have been suggested or which might plausibly serve to meet any of the problems identified would be expensive. Classical legal education, for better or for worse, involves one professor facing 100 or more students in a large classroom. The professor leads the class through a casebook produced at an elite university and promoted by an eager publisher. There are no teaching assistants. There is little individual contact, and there is no need for computers, chemistry laboratories, a hospital or the other costly stage props of most graduate education. Compared to a medical school, or even a graduate department of linguistics, legal education may be flawed but it is cheap--it may even make money for the university.

Trial tactics, estate planning, contract drafting, negotiation and client counselling are not going to be taught very well in a large class with little individual attention. To do these things, we must come a good way toward the graduate or medical school model. Yet university administrators have reason to like schools as they are. Great lawyers have gone through a classical legal education, it is cheap, and so why change? In 1981, American universities are looking for programs to eliminate. Indeed, the Chancellor of the University of Wisconsin-Madison recently held a press conference. He discounted suggestions of some legislators that he could simply eliminate "low priority programs." He said,

> Assume we decided to close the Law School--God knows we wouldn't do it--we have students in the pipeline; we have faculty; we have internal planning and regent planning; and we'd have to declare a fiscal emergency. ...

Despite his disclaimer, some of my colleagues were unhappy with what first came to his mind as an example of a "low priority program". One wonders about his eagerness to revamp the law school budget so that it would approximate that of the medical school or the eagerness of the legislature to support such a proposal.

Occasionally it is suggested that law schools could offer truly practical education if they would only cut out the frills such as jurisprudence, legal history, sociology of law, comparative law and some of the more exotic seminars. You will not be surpised to discover that I think little of the platform of the Know-Nothing Party. I might be willing to consider it if lawyers could find a way to promise me (subject to a right to a decree of specific performance) that they would limit themselves to technical roles of the sort often given today to a legal secretary or a paraprofessional and would never serve in policy-making positions affecting society--former students of mine can or could be found in legislatures, school boards, city councils and all kinds of administrative positions. However, even if this unlikely promise could be extracted and enforced, it is doubtful that law schools would be able to shift enough resources to do many of the things implicitly proposed.

Ending on a Positive Note: Thinking Small about Legal Education and the Competence of the Profession.

Keeping in mind all of these considerations, there are some undramatic changes that individual professors of law could make which might contribute something toward increased professional competence. Interestingly, I think that many of these changes would at the same time help us do a better job of carrying out the intellectual analysis of law which law schools have long defined as their mission.[6] My suggestions are minor and certainly not revolutionary; they will not transform the level of practice noticeably. Yet revolutions are far easier to talk about than to carry out. Here I want to consider what we are doing now at Wisconsin rather than what might be done if only the world were different. I use Wisconsin examples primarily because I am familiar with them, recognizing that others undoubtedly are doing important things as well.

Wisconsin, as is true at many law schools, offers practice skills courses taught by lawyers, it has several clinical programs where students offer legal service to various groups, and it makes efforts to improve writing skills. Moreover, our school has an important hidden curriculum. We are located at the state capital. Units of local and state government and the private bar hire many of our students for paralegal work. Of course, the polite fiction is that all of this work is done under the supervision of a lawyer. However, there are days when it seems that the state of Wisconsin is being run by second and third year law students, and legal research in our town seems to consist of law students telephoning professors who teach in certain areas, with pleas for help. Obviously, important practical skills are being mastered. Our students are dealing with real rather than hypothetical problems.

Several of us on the law faculty have been trying to draw on these experiences in aid of our educational efforts. In several seminars and courses we ask students who have these jobs to draw on their experiences at work as a source of data and to analyze their experiences in light of the theories current in various fields. As is true of most jobs, students seldom find the time or inclination to reflect on what they are doing. We hope they will learn something from the papers they write. At the same time, they are able to teach those of us on the faculty about practices which would be hard to discover in any other way, short of a major research project. In turn, what we learn about some of these practices influences our teaching in the classic traditional curriculum.

A group of us teach the contracts course together, and we have worked to develop our own materials. Based on research and experience, we have tried to emphasize alive and important problems rather than the usual offer, acceptance and consideration. We have attempted to place those problems we select in context. We try to discover why the matter was litigated in the first place in light of all of the pressures to avoid problems, settle disputes harmoniously and minimize costs. We look at the facts as disclosed by the record on appeal, noting how they were transformed in appellate opinions. We look at how cases were argued, both stressing questions of advocacy and plausible contentions ignored or downplayed by counsel and the court. We try to discover, where we can, what happened after the appellate opinion. Often we find that the actual outcome is not what might have been expected--orders for a new trial usually lead to settlements rather than trials; affirmances of judgments for money damages yield discharges in bankruptcy or partial settlements because of a lack of assets; court orders are evaded, particularly when it would cost a great deal to attempt enforcement. Moreover, we try to see whether particular cases are part of a larger pattern. Often the same situation yields opinions resting on different doctrines or prompts movement from a common law to a statutory or administrative solution.

We think that these moves at least set the stage for acquiring professional skills. Expanding the context brings into focus the interactions between the total legal process and people and groups seeking their ends. Obviously, there is far more to law than just appellate opinions and doctrines; lawyers are hired to produce results and this task requires legal rules to be viewed as tools. We stress bargaining and settlements which, after all, are what most lawyers do. Our approach stresses costs. Too much legal scholarship and reform proceeds as if law were free. Getting the perfect result is stressed rather than the best result which real people might be able to afford. Finally, our approach raises problems of inequality. Some people can make better use of the legal system as it actually operates than others. If one must pay to enforce his/her rights, then some will be able to buy more justice than others. Some will be able to use legal process, vague standards, the need for expert testimony and the like to run up the costs their opponents must pay to litigate; large law firms often win a war of attrition rather than prevail in a rational search for truth. Of course, we both honor and teach technical skill, but we also try to teach something about when it is worth investing in research, investigation and trial planning. Moreover, our approach offers the beginnings of an answer to a question which bothers many law students. Again and again law teachers demonstrate that a case could be argued either way--whatever a student says, the professor will leap to the other side and challenge the student. Yet if almost any case could go either way, how does a lawyer counsel a client? Once we move from the perspective of the Olympian appellate judge to that of the lawyer and begin to talk of predicting the likelihood, as well as the outcome, of possible litigation as a factor in settlement negotiations or decisions about whether to take action, we begin to deal with one of the most important elements of professional competence--good judgment.

Conclusion

In thinking about professional competence, we must define the problem more precisely. We can offer all kinds of atrocity stories, and we can agree that they should never happen. Nonetheless, we need some sense of how often what kind of lawyer can be said to be incompetent. We need to broaden our view of competence. Most of the practice of law takes place outside court, and we need to worry about mistakes in counselling and settling cases as well as flaws in trial techniques. We must be concerned with the economics of practice as well. What appears as less competent practice may be all that can be done in light of what a client can pay. Blaming the lawyers may be little more than a way of avoiding the costs of changing the way legal services are provided.

At least in the short run, legal education is unlikely to solve such an ill-defined problem as professional competence. Unfortunately, the time for grand experimental programs seems to have passed. Law schools, as all university departments, probably will have to fight to hold as much ground as possible. Individuals acting alone or in small groups seldom can foment revolutionary change. Yet individual law professors could take small steps which might have some impact. Most simply they could give equal time to both a judge's and a lawyer's perspective. They could take seriously the old claim of legal education that it teaches about the legal process or the legal system. If this were done, students would see a picture taken with a wide-angle lense rather than the small part of the total scene now highlighted by the telephoto lense aimed at the analysis of legal doctrine. Perhaps the first step toward professional competence which a law school could offer its students would be a more accurate picture of what it is lawyers do.

FOOTNOTES

1. See Macaulay, Lawyers and Consumer Protection Laws, 14 Law & Society Review 115 (1979).

2. Hazard, Ethics in the Practice of Law 152 (Yale University Press, 1978).

3. Blumberg, The Practice of Law as Confidence Game: Organizational Cooptation of a Profession, 1 Law & Society Review 15 (1967).

4. Rast, What the Chief Executive Looks for in his Corporate Law Department, 33 The Business Lawyer 817, 845 (1978).

5. Compare Macaulay, Law Schools and the World Outside Their Doors: Notes on the Margins of "Professional Training in the Public Interest," 54 Virginia Law Review 617 (1968); Friedman and Macaulay, Contract Law and Contract Teaching: Past, Present and Future, 1967 Wisconsin Law Review 805. See, also, Gilmore, The Death of Contract 105 note 1 (1974) where I am labelled (or libelled) as the "Lord High Executioner of the Contract is Dead school."

6. Compare Macaulay, Elegant Models, Empirical Pictures, and the Complexities of Contract, 11 Law & Society Review 507 (1977).

DISCUSSION

Professor Kirby (University of Tennessee): I would like to inject into this dialogue an idea that I think receives too little attention in the literature. Just as important as ineffiencies in advocacy is the existence of excesses in advocacy. Some of our most successful advocates are part of the problem of the profession. I think that our students are much better prepared for ethical advocacy than we admit, although less prepared for the dirty tricks of advocacy. I would suggest that we also exercise restraints upon excesses in advocacy. Our students are better advocates than we admit; they have had a lot of experience in it in law school, in court, and in clinics. They have also seen examples of the advocacy of others. I hear many judges say that the young lawyers are doing a better job in their courts than the older lawyers. Some of the lawyers who are criticising us have to admit that young graduates are now better trained than they used to be. The errors that are made in the apprenticeship training, I believe, are empirically less than some might suggest.

Professor Macaulay: We had a Chicano law student. He became a cause celebre among the student body. Several members of the law review decided to present his case before the Faculty. We sat there and saw this group of students come in and do a competent job on us. That was something to be seen, very competent.

Comment: It seems to me that the whole career through the law school should be "a voyage of discovery," offered in a package deal. By the time the student gets to his second year, he is starting to look, for the most part, to what he is going to do when he graduates. He starts to look at the practicing profession, to what the practitioner wants of the young lawyers coming in to his office. The lawyer is not looking for principles now. He is looking quickly for solutions to immediate legal problems; so, this is what the law student starts to look for very early on in his career. In turn, the law teacher is forced to give the student precisely that, as a package deal; otherwise the student does not report well on the law professor. It is extremely difficult not to give a package deal if you are going to be educating for this practical type of competence. Where do we break that circle between theory and practice? How do we do it? Is there any formula that you can suggest? Is it better relationship between the law schools and the bar and the bench? I would like your views as to how we can all agree upon what ought to be done?

Professor Fraser: I do not have a solution, I have a number of comments. I think you are quite correct about the influence of the profession, at least in some provinces, on the choices that students are making in their course programs. I find that students are much more conservative in their course selections now than they were ten years ago; and that, I think, is a reflection of the economics of the market-place. Students are consulting lawyers, and lawyers are saying that because of the pressure of competence and economics, "you should take this or that course."

Regarding your second question, I would say "yes" to more co-operation with the bar. But I think one of the attempted solutions might be to sit down and work out a progression of knowledge, skills and attitudes that should move from first year law school right through into the legal profession. We could then try to determine the educational responsibility of each branch of the legal profession. That is really as far as I could go at this point.

Professor Trakman: On one basic matter we seem to be in agreement. To teach a student a variety of legal facts and substantive principles of law might not, in itself, respond to the needs of a system of legal education. It is not simply a question of how many courses we offer in law school; the question is what are we providing within those courses. The content of courses like contracts and torts is not as much an issue as are the reasoning techniques and lawyering skills that we try to inject into such courses. I think that we skim the surface when we talk about "changing the curriculum," unless we first examine the quality of information, knowledge, and technique that we provide in the classroom. That is a tough question in respect of which the barriers of academic autonomy are likely to be most acute. We are not likely to enjoy being studied on the spot but we may not be able to avoid that consequence.

PROFESSIONAL COMPETENCE AND THE LAW

Second Session: Friday, May 29, 1981

OBSERVING INCOMPETENCE: REFLECTIONS FROM THE BENCH

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INTRODUCTION

Attacks are often lodged against the judicial process. Judges are accused of conservatism, of failing to reflect upon social dynamics. Quite commonly, they are said to be out of touch with conventional community mores. As a result, courts are sometimes considered ill-advised in their assessment of what constitutes "criminal" behaviour, business "practice" and "reasonable" conduct. Even more condemning, is the insinuation that judges, on occasion, fail to base their determinations on relevant evidence, allowing their personal predilections to influence their decisions.

Is the performance of judges significantly dependent upon the performance of the lawyers who present cases before them; and to what extent does judicial incompetence arise independently of the lawyers who appear in court? Two lines of enquiry are adopted in this section. Firstly, attention is addressed to the judges' perception of the quality of lawyering skills, as revealed by legal counsel who appear in court. Secondly, consideration is given to the competence of judges themselves, their ability to weigh evidence, to reach determinations and to render judgment.

The papers that follow reflect upon these questions, highlighting the nature of lawyer and judicial incompetence within the adjudicative process.

MR. JUSTICE MCINTYRE
SUPREME COURT OF CANADA

Ladies and Gentlemen. I don't know whether the relative emptiness of the hall when I get up is a measure of either competence or incompetence of those who get the people in. But I understand that I have to go ahead and carry out this address in the face of the clock even if not in the face of a large audience. I should say at the outset that I was very pleased to note that Professor Macaulay is in favour of competence and I say that, notwithstanding the fact that when he made that prononcement, he stole my first line. But competence, I guess we must all realize, is a relative concept. Competence in the mind of one may very well not be the same commodity in the mind of another.

I am reminded of a story about two law schools. They will be nameless and they were great rivals. A professor at one of the law schools who had attained some notoriety resigned his position and, no doubt for more money, he crossed the street to the other law school. The dean of the law school who had lost his faculty member met a friend on the street one day who said to him "You know Charlie, that is very sad, isn't it, to lose that fine professor?" And the dean replied "Well, not exactly, you see it is a good thing for the public. His move will strengthen both law schools."

I want to note, as well, that Murray Fraser, although I think by and large a Maritimer, is beginning to reveal some of the signs of his approach to becoming a Victorian. He indicated that to be truly Victorian, one has to live there for a hundred years. Well, I can tell you that is not so. One becomes a true Victorian when he suddenly realizes that one is very, very sorry for the rest of the people who cannot live there. You see Victoria is the hub of the world and the most important centre in North America. I went once to the Union Club in Victoria for lunch and I went into the reading room. There scattered about on the tables were many newspapers and there was a headline story that involved an account of how a tug boat going up the straight of Juan de Fuca had dragged an anchor chain, or its tow chain, and caught the direct telephone cable to the mainland and severed it. As I was looking at this, one of the older members came in and he commented that, until they fixed that telephone cable, Canada was simply isolated and cut off.

Now, since I am here to give a view from the bench, I will endeavour to try to tell you first what I think I see from the bench and then I may be so bold as to make a few suggestions as to what I think might possibly be done, both by the profession and by the law schools. I speak of the Canadian experience because that is the limit of my experience. But I suspect that the Canadian experience in this matter is not too different from that of the United States. It is said of Canada that it follows the American lead; that if a development arises in the United States, it will soon, usually within a decade, come to Canada. We are all, of course, familiar with the bright young man who ran around desperately seeking some Canadian problem to fit every American solution. But, nonetheless, I think in this particular field, the experience, the academic and professional training of lawyers will reveal great similarities that may be observed between the two countries.

Now in starting out, I would like to say that advocacy, the role of counsel in court, as distinct from the function of the solicitor whose work is confined to the office or to the library, while always important, is infinitely more important in the trial process than in the appellate process. It is at trial that a case takes its shape and form, and while it is true enough that by the time the matter gets to the court of appeal, its shape may change in certain respects, decisions which are made at trial on a host of procedural and technical matters are generally unchangeable. They frequently have to be made with little preparation, with little time and with more than strictly legal concerns as their bases. For that reason, the advocate is more important, infinitely more important, at the trial level than in any other stage of the proceedings. It should be borne in mind that the trial advocate, however, has to work within the confines of the case that he has before him. Whatever lawyers can be blamed for, they cannot be blamed for the cases they receive and they cannot be blamed for the facts they have to work with. They do not make the facts; they try to make the best of them.

Now, for these reasons, when I refer to advocacy in this address I will be considering basically the role of the trial advocate. What have we seen from the Bar? I think that I may say that, in my view, the American and the Canadian experiences will have similarities. In the material furnished by Professor Trakman for this meeting I refer to the words of Chief Justice Burger of the United States and Mr. Justice Kaufman, and other eminent jurists who have been frequently critical of the American Bar. In fact, many of the statements they have made almost amount to condemnation of the Bar. I can say at the outset that that has not been my experience. I cannot share in that condemnation. My observation has revealed to me, as you would expect, examples of incompetence at the Bar, but we also have examples of extreme competence. In the middle we have a great field of advocates who, by and large, do an adequate workman-like job. I think it follows from this that the law schools of our country must be doing something right somewhere. And I am not here to make a critique of the law schools, although I am quite prepared to make comments from time to time on what I take to be inadequacies in performance, accepting that there are inadequacies in the performance in all the professions.

Now I would like to go further and say this. In my experience, the practicing Bar, at times has displayed deficiencies. I think that I have noted that those deficiencies are, in general, deficiencies in performance and not in capacity. The failure of the Bar, in my view, insofar as it fails, is that it does not use the capacity it has and on occasion does not perform according to the standards of which it is capable.

There are various faults. The first one, in my opinion, is delay. Before I went to the bench I was a bencher in British Columbia. One of the unhappy functions that has to be performed by all governors of the legal profession in Canada and in the United States, I take it, is the disciplinary function. Anyone who has had any experience of the discipline of the Bar will know that if all lawyers would diligently address themselves to all problems that come before them--as and when they come before them--the number of cases requiring disciplinary attention of the benchers in a particular province would diminish to a great extent. One of the worst faults of the Bar is delay. It is, I think, the greatest single cause of injustice and failure in the courts. It is not merely a cliché to say that "justice delayed is justice denied!" All of us who work in the courts see it happen every day and that is my principal criticism of the Bar and I think it can be said that it is not attributable to law schools.

The second problem, the second failure on the part of the Bar, as far as I can see, is the lack of preparation that goes into the presentation of cases. Here again this is something which, in my opinion, cannot be laid at the door of the law schools. I have heard it said that there are two kinds of lawyers: there are those who look up the law before they commence a lawsuit and those who do so before they go to the Court of Appeal. It is rarely that the first type of lawyers find themselves in the Court of Appeal. Now, I do not say that all counsel come unprepared. We have many examples of good preparation and one has to bear in mind, I suppose, that there are reasonable limits to preparation. Professor Macaulay drew attention to this fact and obviously he is right. Lawyers cannot be expected to work for nothing, any more than any other professional. And it follows that there will have to be some limit to preparation imposed on all cases. On the other hand I am reminded of an occasion when I was teaching a course in civil procedure to the articling law students in Vancouver. Now, these students were required to attend cases in the evening while they were articling after they had finished law school. At one of the lectures I posed a problem. The purpose of the lecture and the whole scheme of the evening was to discuss from beginning to end the steps that would have to be taken to deal with this problem. We went through these steps in a two-hour period with ten minutes for coffee in the middle. When it was all over one of the young law student said with contempt: "How do you expect us to do all that? The case is simply not worth it. You can't do it." And I said: "If you take that attitude now, if you think that there is a limit to the preparation that you can give, you had better leave the profession and not go any further." Now that was an unjust remark and I have realized in later years, as I and I think Professor Macaulay indicated, there is a reasonable limit that applies to the question of preparation. How that limit can be found in each case and how it can be applied, I do not know, but I say this. There is no such thing in the law as an unimportant case. There may be some that are easier than others, and some that are more difficult. Some cases may involve more, in the way of money, and some less. But there are no unimportant cases because, to the client involved, the case that confronts him is the most important legal episode of the decade. Even though there is a limitation upon preparation in some cases, it must be accompanied by the realization that there are no unimportant cases and that the aim of the profession must be to give full service to the client; and preparation must be adequate to the occasion.

The third problem, one which I suppose is an aspect of preparation, is what we frequently refer to as 'negligence'. Sometimes it is referred to as malpractice; but malpractice, in my opinion, involves a quasi-criminal element, if not an actual criminal element. When I speak of negligence I speak of it in its classic sense: the failure to take due care. We see examples from time to time in the Court. There are matters that reach us--after they have gone through trial, gone through the level of the provincial court of appeal and come to the Supreme Court of Canada--where a decisive point has been missed in the whole procedure. What does the court do with that? Do we send it back to trial court to repeat the process? The client is going to pay for that, or somebody will have to pay for it. Or do we seize upon the point that was not argued, dispose of the case and therefore dispose of the interests of the client without any adequate argument, preparation, or consideration of his or her case upon that particular point. That is a problem that all appellate courts face and it arises in great part from negligence; not from a failure to understand on the lawyer's part, but from a failure to make use of that knowledge which the law school imparted and past experience has or should have provided.

Another failure in the practice of law, and in this it may well be that the law schools do have some responsibility, is the failure to recognize the individual limitations that we all have. Some people are suited to be advocates, but many are not. I know good lawyers, many learned, diligent, honest and competent lawyers, who are failures in court, and insofar as the law schools have exulted the advocate's role, they have done, I think, a disservice to the profession, because the 'solicitor' branch of the profession is equally important. It is not necessary for lawyers to prove they are real lawyers by going to court. They prove frequently that they are real lawyers by having enough sense to stay out of court and remain in the office performing one of the most important functions in the process of litigation. In other words, let the solicitor make the bullets and let the advocate fire them!

I am not suggesting that we divide the profession in Canada, as has been in done Great Britain. That would be totally impractical and impossible in a country like Canada, with a population distributed thinly over a vast area, as it would be, I take it, in the United States. But I do suggest that lawyers, particularly lawyers who are practicing in association with other lawyers, should take advantage of the separation of skills. Let the advocate be an advocate and let the non-advocate work in his office carrying out his important function, doing what he does best.

What can be done about remedying these defects? Well so far you will see that I have not been critical of law schools. I do not think there is very much that law schools can do to meet the problems that I have tried to outline. But the law schools are not without fault. There is a great division in the profession in Canada and in the United States, a division between what we loosely call the 'academic' branch of the profession and, for want of a better expression, the practical or practicing side of the profession. This is a sad development. I am not entirely sure how it has developed, but I think, and I say this after much consideration, that in this matter the unlettered practitioner is more sinned against than sinning. I do not attack the academic. I will have something to say in a few moments as to what I think the role of the law school is or should be, for I feel that the attitude expressed from time to time by many academics, and communicated, I think, to their students has been one bordering, in some repects, on contempt for the practicing profession.

Now, I do not suggest that this has been done intentionally, and I do not suggest for a moment that the practicing profession ought not to be criticized, or that it could claim any particular immunity from such criticism. I have observed that one of the most notable developments in the attitude of young lawyers just out of law school takes place in the first two years of exposure to practice when they suddenly realize "it is not quite like they told us; it is different!" The young lawyers have not been entirely prepared for the world of practice, so we have to bridge the gap within the profession. Nothing is served by trying to apportion blame or responsibility. We have to make an effort through the educational process to raise the level of competence within the profession. In the common law provinces of this country, generally speaking, after about three years of law school and after one year--in some cases two years--under articles, the student is turned loose on the profession! Thereafter he is admitted to the Bar, or called to the Bar and admitted to the practice of law, and then turned loose on the public. That is not good enough. The law schools have long insisted upon the control of academic training in the university and they certainly have it, and maintain it. The profession has always insisted upon control and direction, as far as the practical aspects of training are concerned, after the law school years are finished, and they should have it. But a moat ought not to be build between the two functions and I suggest that it is in the post-law school training that the academic and practical branches of the profession can come together, to work out cooperatively a sound, practical, advanced training for the benefit of law students and the profession at large. In this cooperative effort they might very well be able to 'bury the hatchet,' and not in each other's heads!

It is interesting that Murray Fraser mentioned certain developments that are taking place in British Columbia. There are important developments also taking place in Ontario. There may be examples in the other provinces; I do not know. But what is happening in Ontario is that there has now been created, in addition to the year of articles, a Bar Admission Course. It is run by the Law Society of Canada. After a student graduates from law school and has had a year under articles in a practicing firm he goes back into the classroom for six months. He is taught again in the classroom setting, after he has had a year getting the 'edges rubbed off'! Now I do not say that it is the perfect arrangement. I have talked to young lawyers and had varying reports. I have talked to practitioners who generally seem to favour it. Whether it is a good idea or not, it is notable that the law schools contribute nothing to the course, except possibly in some cases, the physical facilities. I do not criticize the law schools for that, no doubt this arrangement is designed by the profession, but I say that the law schools and the profession have got to get together on this. There are resources in the law school that could be used without detracting from their primary function within universities. This, I suggest, should be done.

In British Columbia, they do not go as far in the Bar Admission Course, or they had not gone so far when I left that Province. But again the profession has excluded the law school from any real participation in the post-law school years and, in the city of Vancouver where, I suppose, eighty percent of the profession practises, students are required to attend a carefully worked out series of lectures, seminars and written examinations before they are admitted to the Bar after they have finished law school. Various techniques are used, from correspondence courses to one-half day session in the upcountry where it is impossible to collect a large number of law students. Again you have the academic branch and the so-called practical branch not working at odds, but not working together.

Let me reiterate what I am trying to say. I do not say the practicing profession should give up control of those programs and I would resist strenuously an attempt by the practicing profession to enter into any control over the university programs. Control must, in my opinion, be separate in the two both phases. But separate control does not mean that voluntary cooperation cannot be worked out so that the facilities and the resources of both branches of the profession could be used to some extent throughout the whole of the learning experience of the young lawyer. I suggest that the approaches that are being made in the Provinces of Ontario and British Columbia, however inadequate they may be at the moment, however imperfect, are positive responses to a problem which will always be with us. The objectives of both the academic and practicing profession should be to expand joint efforts to find a means of raising the general level of competence within the profession.

Now, I have just one more short comment to make. I was interested to read in the materials provided by Professor Trakman for this meeting some words uttered by Judge Schwartzer of the United States. He was laying down certain suggestions and describing ways in which he controls or tries to compensate for a lack of competence on the part of the Bar. He seems to rest his proposition on the thesis that it is the right of a person to have adequate representation in court. He then concludes that it is the duty of the court to see that justice is done. I do not think that anyone would quarrel with either proposition. He said that that duty meant that the judge, when he observed incompetence on one side or the other, would have to intervene and redress the balance. Well, you can put forward a very plausible argument for that proposal, but ladies and gentlemen, it does not work. A judge must ask questions from time to time in order to make sure that he understands the submissions that are put before him and in order to clear up obscurities and, occasionally, to ascertain whether a point will be raised or whether it will not be. But the judge should interfere only to ascertain information and not to attempt to direct the line of proceedings. No judge can possibly know what has passed between solicitor and client. The judge cannot possibly know what evidence may be called, or what decisions may have been made in the course of the action. A point that seems to be of no significance to the judge on the first day in court may assume tremendous importance on the third day and his interference in an attempt to do better than counsel will be productive of more delay and more injury to the interests of the litigants than would be the incompetence of counsel.

I have seen it happen, and I have rarely, if ever, seen judicial interference aimed at directing the proceedings serve the interests of justice or advance the general scope and progress of the litigation.

Now, I could say other things but I should find it more enlightening and a great deal more fun to have some questions. I do not know whether my remarks have raised any questions but I would certainly like to have some.

DISCUSSION

Mr. Armstrong: I am wondering Mr. Justice McIntyre if you would comment on the possibility of a kind of overview by the bench of the competence of practitioners that come before the bench, with a view to reporting incompetence to other practitioners, to the practicing Bar, or to a judicial committee. In other words, could you give us your views on whether a judge can or should possibly become involved in that sense?

Mr. Justice McIntyre: Well I suppose there is a role. But I would suggest that there are also one or two warnings. The bench's position ought to be general in this matter. It would be a great mistake to have anybody from the profession or the law school solicit from a judge comments about any individual practicing in the court before him. I think that a judge's assessment of the competence of the Bar generally, or the competence of the Bar within certain field of litigation, might be of assistance. It probably would not be any better than any one else's opinion because judges are no better judges of such matters then are fellow practitioners. But I think that one should be very careful that the judge is never put in a position of being asked to comment unfavourably upon the performance of a practitioner as an individual.

Comment: Do you think judges could be called upon to regularly report upon incompetence in the profession in general?

Mr. Justice McIntyre: Well if you call upon judges regularly, I think you will get responses at about the same rate that you would get if you ask the profession at large. Judges are no better at responding to that sort of question than anyone else. I do not say there is no role for the judge here but I would have to think very seriously before I would like to see the bench venturing into matters of controversy within the profession.

Professor Fraser: Within the last month, the benchers in Vancouver delegated to the Continuing Legal Education Society responsibility for the administration of the Bar Admission course. This to me seems to be a step towards the creation of the bridge between law school and practice. We are taking another step through the appointment of a full-time academic, on leave, to direct the Bar admission course.

In British Columbia, I should add there seems to be a growing trend for judges to comment about the quality of counsel. There is one case in Dr. Trakman's conference materials and also a more recent case in which the judge said that, in listening to the case, he had great difficulty in believing that the statement of claim had been put together by a member of the Bar. Should a judge not be entitled to so comment?

Mr. Justice McIntyre: You point out some of the very dangers that I was trying to draw attention to myself. I would not, as I said before, exclude the possibility of a role for the judge in this process. I know the case to which you are referring. I had not intended to mention this case unless it came up. In the particular case you speak of the trial judge interfered by taking the case right out of the hands of counsel. The young lawyer who had acted for the plaintiff had the case dismissed by the trial judge after only a short part of the evidence had been heard. The young lawyer then found himself the appellant because the case had been reported in the law reports. Now the judgement of the Court of Appeal is instructive on the very point that I am making. It was very moderately written but it leads to really a severe rebuke. Nobody came out of that affair well at all. That is an illustration of what I am trying to say. The trial judge should not have interfered. The process of litigation should remain as a two-way fight. Now if the benchers of the Law Society and the judges can work out some scheme whereby they can exchange information or make recommendations on competence, there may be some possibilities; but I do not like judges talking out of court. And I think that each segment of the profession, the academic and the practicing bar, really must be responsible for keeping itself in order, because each segment becomes responsible when it falls out of order. So I would not want to involve the judges too much in dealing with the competence of individual lawyers.

CHIEF JUSTICE COWAN
SUPREME COURT OF NOVA SCOTIA

I am opposed to trial judges reporting to a disciplinary body individual instances of what they consider to be incompetence or malpractice. I do not think that this is our function. It would be unfortunate, particularly at the trial level, where the same lawyers tend to come before the same judges and they have no choice in the matter. It might create the impression that the judge is against that particular lawyer. On the other hand, if judges are asked for comments in general as to what deficiencies or incompetence they observe, then I think that can be done without giving specific instances. I do not see any reason why we should not do that. I have a practical example. There was a case where a junior associate lawyer in a firm was conducting a case. He used a method of presenting his evidence and asking his questions which I thought detracted from his presentation. I did not comment at the time; but the case was disposed of and decided. Several weeks later he was in on a pre-trial conference with a senior from the same firm. After that matter was over, I asked if they would stay for a minute and I spoke to both of them. I said that I was impressed by junior's preparation of the case and by his pre-trial brief, but I thought there were certain mannerisms that he used which he might reexamine. I suggested that he look at the example of some other people. He accepted it very well.I think that is the approach I would take. I would speak to him in private, and with an older member of the same firm present, and draw this to his attention. He was obviously unaware of it. It was due to inexperience and a certain diffidence and certain nervousness. I thought that was beneficial. I would not comment in court at the time of the case because it might give the impression that the judge felt that the conduct was not one that he liked. That would be unfortunate. So to that extent, I think, trial judges can be of assistance.

I will deal with my own experience at the trial level in the court in which I work--I am completing just about my fifteenth year there. I came out of a busy practice, a solicitor's practice at the end and a general practice at the beginning, with five further years of law teaching: a total of twenty-five years of practice, with the last few years devoted to tax law, company law, estate planning, wills, etc. I was not too familiar with the rules of civil procedures, which may surprise some people. I had not had a recent association with it. As a member of the bench I have had some interest in, and some participation in, reform of the civil procedure rules. We try criminal cases with a jury, civil cases with and without a jury, and also divorce cases; and we are met by all kinds of family law problems. As a new trial judge, I was struck in the cases by, what appeared to be an unfamiliarity with the ordinary rules of evidence, by the necessity to prepare cases and, generally, by the principles of advocacy. Now, this is an experience that all newly appointed judges in the court have had. They come out of busy practices. They are used to associating with people on the same level of expertise and experience. Suddenly they are put in position where they hear all kinds of cases and all kinds of lawyers presenting cases. They are struck by an apparent lower level of competence than they are used to in the practice from which they came. Now I do not say that the level of competence is lower than it was when I came to the Bar or when I left the Bar and went to the bench. They are many reasons for this. I think that one reason is, that when one becomes a judge at the trial level, one sees everybody appearing as counsel. This, perhaps, is one defect in our system, in that everybody who is admitted to the Bar in the province of Nova Scotia is considered, and considers himself or herself, to be competent to conduct that case. *They are certainly considered by the* public to be able and competent to conduct that case. In many cases, I suspect, lawyers take on cases and start actions without the kind of consideration that is given by people with more mature judgement and longer experience. We find, as is true in most of jurisdictions, that actions are commenced at our trial level in ever increasing volume. This is due to many reasons. There are many more lawyers involved in the trial process. There is a higher percentage of younger and less experienced lawyers than a few years ago. There are greater economic pressures; and apparently there is less consideration given to the merits of a particular claim and to the chances of success. I base this, not only on my own experience, but on the experience of the other judges, and on the comments of the officials of the court. Court officials will say to me "you know that action should not have been brought." This is a pre-judgement; but they know that there are many actions that are started without merit. In some cases there are delays in bringing them; and when they finally are brought for trial, they are settled or abandoned. So there is a higher percentage of cases started by lawyers without, I think, due consideration.

This perhaps is based on inexperience. It is also based on a reluctance, as I see it, for younger lawyers to consult older lawyers for various reasons. They are reluctant to acknowledge that they are not as experienced as they might be and that they want assistance. There is a fear of adding to their client's costs, and a reluctance to share the fees that are thought to be involved in the particular matter. There is a lack of preparation for trial in some cases. This is probably due to inexperience, and an unfamiliarity with the problems involved, and also to a reluctance to consult somebody else. In the case of large offices, Mr. Justice McIntyre suggests, and I agree, that people who find, after trial and error, that they are not suited to advocacy, should pass these matters on to somebody else in the office. This is not possible with a person who is practicing alone, or in a small firm where other members of the firm are perhaps doing real estate or purely solicitor's work. They feel that, as they take these cases on, they have to carry them through. They undertake the advocacy for which they may not be suited.

In addition to trials at our level, we see several thousand chambers applications annually. The one thing that I have noticed there is the quality of the documents that are produced. These are produced by people who are not, in many cases, involved in advocacy or in appearance in the court on a day to day basis. They have a solicitor's practice and they apply for various orders for foreclosure and sale, and appointments of guardians and things like that. In many cases the papers have obvious errors. There are errors, not only typographical errors, but omissions of one kind or another. This has concerned me, because I feel that, if this is a sample of the kind of documentation that is being prepared in particular offices by lawyers, then there must many other sloppy documents produced for use out of court. Documents presented in court can be amended; wills, can be amended and redrafted from time to time. But there comes a time when they are very final documents. If there are errors in them they can create great problems.

This may not be true in the case of documents drafted by specialized lawyers who concentrate on trust deeds, debentures, and bonds. They are used to that type of drafting, and in my experience they do not usually make errors of that type. It may be that this situation arises because of a difference in approach. Such lawyers are perhaps dealing at a higher, economic level and can afford the Rolls Royce type of lawyering that the ordinary application in chambers or in a court would not justify.

The other point I would like to mention is that it is difficult for a judge, and wrong for a judge, to intervene in the conduct of trial. I agree with that in principle. The result is that many trials take a long, long time. Many of the questions asked and the answers given have very little, if any, relevance to the ultimate issue, and in many cases, are repetitious. One of my colleagues went, a couple of years ago, to the appeal division of our court and he was appalled by the sheer volume of the material that he had to read in all the appeal cases that arose. Most people who look at transcripts realize that at least fifty percent, and perhaps a higher percentage, of all the verbiage could very well be eliminated without affecting the ultimate result. It is not easy for a lawyer to decide initially that he will not ask such and such a question, because it may turn out to be irrelevant. I try to explain to juries that it may be necessary to ask certain questions at a certain time in a trial even though these may turn out to be irrelevant later.

On the other hand I think there is a tendency on the part of some lawyers to continue to ask questions long after they have proved their point, or exhausted the witness, or the patience of the judge or jury. I have a feeling that many lawyers, particularly young lawyers, feel that if they are retained they must ask questions. If the client is there, as he must be if he is the accused, he is sitting expectantly and the lawyer feels that he is expected to ask a lot of questions. The experienced counsel will ask the relevant questions, and only the relevant questions, and will then leave the other matters unquestioned and not brought out.

This again is a matter of experience and of judgement. I would not interfere in a case like that, unless cross examination goes on at great length. I may indicate that they have made their point, but they can always say they are cross examining on the issue of credibility. That is difficult to close off. It is a difficult problem to know how one can control litigation, particularly when there is limited amount of time available. You know that another day is coming with another case and if you cannot take that case, it may never be heard, at least at the current sitting.

One problem that was mentioned by Mr. Justice McIntyre is the question of delay. He indicated that he did not feel that it was the duty of the court, where the issue of counsel incompetence arose, to see that justice was done. Now in this province, we take a little different view, at least I do and fellow judges have agreed. We bring cases on for trial. When I was appointed as Chief Justice, I went back through a number of cases in which defences had been filed in the registry at Halifax, but where such cases had not yet been litigated. I went back for eight years and brought them all on, under an existing rule which we had to show cause why they should not be dismissed if not proceeded with. I remember I found one where eight years had gone by. The plaintiff, who was the father of a boy who had suffered a brain injury in an automobile accident, had obviously retained a family friend whose main practice consisted of prosecuting at the municipal level for traffic offences, etc. He started an action. The boy was very severely injured and remained incapacitated. The defence was put in and that was all that had happened. This case was brought on, for trial. The lawyer had not done anything because he did not know what to do. He did not even know that he should obtain medical advice. He had no idea what the range of compensation should be. The result was he did nothing. That was before medicare and hospital care and the parents had been drained of all their resources. Everything they had had gone for this child of theirs, and they had no money. That may be another reason that they could not come forward with refreshers for the retainer that had originally been given. I do not think that was the main reason. We brought it on under our rule and the result was that their lawyer referred it to a more experienced lawyer and within a matter of weeks it was settled. This I feel we should do.

We have a rule which brings on cases that have been on the "general list," which means where the defense had been filed for more than two years. Next Monday morning at 9:30 a.m., I will preside on a couple of hundred cases. Notices have gone out a month ago saying that these cases are going to be considered. The lawyers have to show cause: "Do you want to continue? Is there some reason why this case should be continued on the list? If not, the case will be dismissed without costs to any party." As a result of the one month's notice, I get a flood of letters saying "This file is being reviewed. It is being settled; or we want to keep it on because we are waiting for a medical report" or something like that.

So we attempt to purge the list. I know that other judges do not agree and that other courts in other places do not agree. We take responsibility for litigation once the defence is filed. We push these cases along and bring them on for hearing. I think that in that way we attempt to do justice and serve the public.

The second point I want to mention is the lack of preparation. We have covered that point by requiring pre-trial briefs from each counsel, prior to trial. Although there is a limited time for the filing of such briefs before trial, it has proved to be very beneficial because it forces lawyers to prepare their cases, and brief the law. It also gives the judge an opportunity to review the authorities cited, and to know what the basic issues are. We do not look at the pleadings very much, we look at the pre-trial brief. What is the main issue? If you look at a statement of claim a lot of it is boiler-plated and subsidiary. The pre-trial brief gives the judge knowledge of the issues and the cases to be cited. He also has the opportunity of preparing for the trial. The result is that we normally find very few cases cited after the hearing. We do not use transcripts at the trial, except in very exceptional cases. These are reserved for use in the Appeal Division, and ultimately in the Supreme Court of Canada.

Normally, argument takes place at the conclusion of the taking of evidence. At that time, in many cases, the lawyers will say they have nothing to add to their pre-trial briefs. They are quite free to add any further authority. In most cases the judge may deal with such additional cases at the conclusion of the hearing, without having the lawyers feel that cases cited in oral argument without a pre-trial brief have not been considered by the judge.

So, to sum up, I feel that the court should have a certain responsibility for the conduct of the cases and for helping counsel and encouraging them to prepare their cases in advance and to present them in an intelligent way.

I refer again to the question of interference, or intervention by the judge. I will mention a couple of cases. One was a case where three people were charged with rape and the prosecutor produced his witnesses, including the complainant who told all the gory details. After they had been cross-examined on behalf of the accused, there was no evidence at all that the woman was not married to either of the accuseds. That is of course a basic element of rape. Now, I could have kept quiet. The result is that I would have had to grant a directed verdict. So when they were all through, I asked her "Are you married?" The answer was "No". I added specifically. "In particular, are you married to any one of the accuseds?" And the answer was "No". I felt I had to fill a gap because otherwise justice would not be done.

I remember another case involving a lawyer who was five years at the Bar. He was trying his first case, as far as I know, and he had to prove ownership and operation of the defendant's vehicle. He called a policeman and of course there was objection that be could not ask the policeman what the defendant had said at the scene of an accident. So, he was stalemated. So I said "Did you have discovery." "Oh yes, my Lord". And I said "Well where is it." And he held up the transcript and said: "Here it is." I said:"What do you propose to do with it?" And he was nonplussed. The lawyer on the other side who was acting for an insurance company and was very experienced, had already said "Oh no, my Lord, there is no admission as to ownership or operation." So when I was asking these questions, he could tell that the next thing I would say would be "For God's sake read the admission of ownership and operation." He said "Well, my Lord, to save time I will admit the ownership and operation of the vehicle." Now, that again is a civil case. Should I have let it go? I do not think so. That young lawyer later spoke to me and said that in five years at the Bar, he had never tried an action before. It was obvious from the way it was conducted. That was pure inexperience. I felt I had do something to help along the cause. Now, I would agree you should not intervene to try to help an obviously experienced and incompetent lawyer conduct his case. You may lose it for him eventually.

There are limits beyond which a judge should not go. I think there are some ways in which we can help. I tend to be an activist and feel that the bench should participate, not only in the conduct of litigation and in the instruction and training of lawyers but also, for example, in law reform. We have referred to delay in many cases, some of which are motor vehicle personal accident cases. The defendants, insurance companies for the most part, never were anxious to bring them on. We recently recommended to the Attorney General of the province the adoption of pre-judgement interest which was introduced in England and copied in Ontario and British Columbia. This arrangement took away the incentive of insurance companies to let matters lie and encouraged them to bring matters on or settle because they were now faced with prime rates of interest rising to 18 and 19 percent. That has been a good move. The reform was introduced, I think, because of prodding from the Bench. I am sure it did not come from the Bar.

That is my comment. I agree with the comments of Mr. Justice McIntyre that generally the performance of advocates is at a fairly high level. I think that lawyers coming to the Bar are better trained coming out of law school than they were in my day. We do have a Bar Admission Course in this province which is part of the articling system. This has recently been lengthened from nine months to a year. Generally, I think, the results are beneficial. I tend to think that the Bar should look to some method of specialization, and of certification which would be helpful. I know there are problems involved, but I think they can be met.

I have talked too much. Are there any questions to Mr. Justice McIntyre or to me or generally on topic?

DISCUSSION

Comment: I realize that it is just not possible for a judge to deal with matters such as making decisions involving questions of competence or the reform of incompetence. But would there be any objections to judges participating with benchers in a general type of discussion on competency? Some of the judges I have talked to about this have felt that they should not so participate.

Mr. Chief Justice Cowan: My own reaction is "no". To discuss the problem generally and to act as a member of the disciplinary committee--no I see no objection to a judge being involved because he is not identifying any individual practitioner. This a matter which will probably affect the judges in provincially constituted courts rather than the Supreme Court of Canada, because we in the provinces have a closer relationship, perhaps, with governing bodies then do Supreme Court judges. Perhaps Mr. Justice McIntyre has a comment.

Mr. Justice McIntyre: I feel you would run into trouble with the benchers if you tried to institute this arrangement. I do not think they would agree to any judicial interference. I do not think they should. They have the duty, according to law, to discipline the profession; and it is a duty they must discharge. They also have the responsibility to see that the standards of competence are maintained; and they have to do it. Now I do not doubt that, from time to time, they can call upon judges for help and advice. My reaction, as a bencher of the Law Society of British Columbia, was that judges should stay in their courtrooms and that benchers should look after the profession; and I still have that feeling. Judges should stick to judging. I do not think the bench has any particular expertise in the assessment of the educational standards of the profession. They have no more than anyone else. They are probably in a good position to assess performance. There is no magic in the bench in having solutions to such matters.

PROFESSIONAL COMPETENCE AND THE LAW

Third Session: Friday, May 29, 1981

A DEBATE: LAW SCHOOLS--ARE WE RELEVANT?

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DEAN FRANK IACOBUCCI AND PROFESSOR HUDSON JANISCH
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I. Introduction

Briefly, what we wish to do is spend a little time on what is meant by professional competence in order to see what relevance there is between the subject and the law schools. In our view, this naturally leads us to a consideration of what is involved in the making of a good lawyer and how that relates to the objectives of legal education and a law school. We will then discuss what we regard as areas where law schools presently do well in efforts to improve professional competence, followed by areas where law schools (and legal education generally) arguably fall short. We then make some suggestions for exploration and possible development by law schools ending with some caveats and qualifications.

Naturally, our comments are made in a Canadian context and may be even more parochial by our reference to experience in Ontario and even more specifically to law school developments at the University of Toronto.

II. What Do We Mean by Professional Competence?

(a) Some Definitions and Comments

According to the Record of Proposals of the Conference on the Quality of Legal Services, Canadian Bar Association, 1979, competence is defined as the state of having the ability or qualities which are requisite or adequate for performing legal services undertaken:

> A lawyer is competent if he has the demonstrated capacity to provide a quality of legal service at least equal to that which lawyers generally would reasonably expect of a lawyer providing the service in question. The words 'demonstrated' and 'reasonably' must be liberally interpreted so that any review of competence will take into account all circumstances, especially those of new graduates and of practitioners in small centres.[1]

Our colleague, John Swan, has warned us of the need to be careful about the standards set for competent performance of professional work.[2] His phrase "competent performance" is noteworthy, for, as in been pointed out, there is a difference between competence and good performance.

> Inadequate lawyer performance--the failure to meet a satisfactory standard in some task undertaken for a client--is not synonymous with lawyer incompetence. Competency properly refers to an individual's capacity to perform a particular task in an acceptable manner. A lawyer's actual performance may fall short of the appropriate standard for any number of reasons unrelated to competence: inattention, laziness, the press of other work, economic factors or mistake. Indeed, available evidence suggests

> that reasons such as these, not a lack of capacity to do a proper job (incompetence in the narrow sense), are the cause of most instances of lawyer failure.
>
> The notion of competence must be expanded to include elements of character and professional responsibility in order to comprehend most of the factors necessary to assure an adequate level of professional service. Technical virtuosity does not translate into the routine rendition of high quality professional service unless it is disciplined and controlled by proper attitudes, work habits, and values.[3]

However, Professor Trakman states that in his view competence is, in effect, a measure of both capacity to perform and performance itself.[4] In the broad sense, we think he is right.

Whatever definition of professional competence is chosen, it is clear that the definition will involve ex hypothesi terms and elements which require further elaboration and interpretation. Any definition of competence will, as Professor Paul Carrington has pointed out, reveal that:

(a) Competence is a relative term in that it is not an absolute standard;

- lawyers cannot be uniform in skill.

(b) Competence is attitudinal;

conduct of a trial depends on preparation which may involve dedication, enthusiasm, intelligence, integrity and so on.

(c) Competence is situational;

if work is performed in settings that do not reinforce the pride of the worker, competence will diminish; economics is involved here: more pay should mean higher standards of performance.[5]

As Carrington suggests, to the extent competence is relative, attitudinal and situational, it is not likely that substantially higher standards can be produced by (traditional) educational means.[6] In the words of one U.S. judge: "Insofar as bad lawyering is the product of bad character, or laziness or apathy, there is little that can be done by way of education."[7] As Mr. Dooley succinctly put it, "Ye can lade a man to th' university, but ye can't make him think."

This last point illustrates the complexity of professional competence because it is, in fact, a subject that is not only relat to what a lawyer has obtained from his or her law school and post-law school education and experience but also what the lawyer has taken from his or her pre-law school education and experience. If the experts are right when they tell us that important values and qualities of our make-up are determined well before we go to school--let alone law school--then professional competence is a more pervasive subject than most of us initially thought.

Harry Arthurs in his recent review of John Willis' fine book on the history of Dalhousie Law School concluded as follows:

> I have deliberately refrained from asking the most difficult question, the question that Willis often asked himself and all of us, sometimes in despair, and sometimes in defiance: What difference does it all make in the end? Can a law school make its graduates more self-fulfilled or successful, their clients better served, its community more humanely governed and its legal system more just than they otherwise would be? Or do we law teachers, like mediaeval monks, simply record, transcribe and illuminate the songs of more eloquent poets, the mysteries of ancient traditions and modern catastrophes, or the mythic achievements of the men of action in the world around us?[8]

We see this question of the nature and extent of any causal relationship between a university education in law and competence in practice as absolutely basic to this discussion.

(d) Relevance of Law Schools

To the extent competence relates to the capacity of a lawyer in terms of knowledge of law and legal institutions and skills in the application of that knowledge, surely legal education generally, and law schools in particular, are directly relevant to the topic before us.

To explore this a little more we should perhaps spend some time on what we mean by a "good or competent lawyer", and then discuss briefly what we think are the objectives of legal education and the role of law schools in that respect.

III. Qualities of Good Lawyers and Objectives of Law School Education

(a) Good Lawyers

Close to ten years ago, the Carnegie Study on Legal Education summarized the qualities exemplified by a good lawyer as follows:

> (1) Analytic Skills. [Analytic skills] refer to those special capacities of the lawyer to distinguish A from B, to separate the relevant from the irrelevant, to sort out a tangle into manageable subcomponents, to examine a problem at will from close range or long distance, and to surround a problem, surveying it from many different perspectives.
>
> (2) Substantive Legal Knowledge. Every good lawyer knows some law, knows something of the general sea of substantive doctrine in which he works. In comparison with the entire legal universe,

no lawyer, of course, knows very much law outside the single field or sub-field in which he has specialized. But every good lawyer can locate himself and his client's problem on the general map of substantive law.

(3) Basic Working Skills. The first-class lawyer has at hand a bag of basic working skills. Most of his work involves the amassment of information and the skillful use of communication. The first-class lawyer knows how to write, how to use a library, how to be an advocate, how to listen, how to draft, how to interrogate, and how to find out what he decides he needs to know.

(4) Familiarity with Institutional Environment. It is not enough for a lawyer to have thought a problem through, to know some law about it, and to be able to write a lucid document about it. The first-class lawyer is also familiar with, and able to operate effectively in, the institutional environment in which the problem arises. He must be able to deal with people, to negotiate around a table, to stand on his feet in a courtroom, and to unsnarl or cut his way through the red tape of courts, administrative agencies, legislatures and other legal institutional structures.

(5) Awareness of Total Non-Legal Environment. This involves the ability to comprehend the non-legal environment of the problem at hand, to evaluate the impact that non-legal considerations will have upon the outcome, and to perceive the ways in which the knowledge and insight of non-lawyers can be mobilized and brought to bear. Every legal problem arises in its own unique setting of economic and political considerations, historical and psychological forces; each legal situation raises its own problems of data accumulation, ordering, and weighting. The legal process is a part of a vast surrounding social process; the first-class lawyer never loses sight of that large picture, and he knows when and how to call upon accountants, psychiatrists, doctors, economists, market analysts, sociologists, statisticians or others whose expertise can help him and his client.

(6) Good Judgment. Difficult as it is to describe abstractly, all of us know in general what we mean when we say that 'Lawyer X has good judgment' and all of us know that good judgment is a major distinguishing characteristic of the first-class lawyer.[9]

(b) Objectives of Law School Education

To some extent, the objectives of a good legal education will overlap with the qualities associated with the Carnegie list of qualities comprising a good lawyer. We do not wish to imply that all aspects of the list can or should be attained in the law school part of a person's legal education.

Perhaps it is at this point that we should pause to emphasize that in Canada, law school is normally followed by a period of articles and in

Ontario by a very formal Bar Admission Course. These programs are, of course, directly related to professional competence and have to be remembered especially when one reads about the question of professional competence in other countries such as the United States or United Kingdom where requirements differ.

We should also point out that on the list of good lawyer qualities are some items which are traditionally--and we think rightly--more emphasized in law schools compared to other items on the list. Analytic skills and substantive legal knowledge are the obvious examples. Indeed, it is probably the other qualities on the list that many observers feel are not sufficiently reflected in the curricula of Canadian--and perhaps U.S.--law schools.

When talking about the objectives of legal education, one cannot omit mentioning the central basic and important fact that a law school is a division of a university, and, as such, it must subscribe to the general objectives of a university which, in the law school context, includes the free exchange of ideas and the pursuit and dissemination of scholarship directed toward the reform of law and the legal system. In short, law schools must, as Professor Allen states, assume a "knowledge-finding and critical function" and their focus of concerns will often embrace areas of social interest of importance which sometimes are "far removed from the practical concerns of the practicing bar." Professor Allen goes on to say that these facts are well understood by many lawyers and this conception of law schools has not only been tolerated but also has been aggressively supported by enlightened members of the bar. He notes that this support has been based on the social importance of having law schools perform these functions and on the feeling that such schools are most likely to produce the best qualified lawyers.[10]

IV. The Role of Law Schools and Professional Competence

In dealing with the role of law schools and professional competence, we have divided the discussion into three parts: where law schools do well in strengthening competence, where they allegedly fall short, and where they might consider further exploration and development.

(a) Strength of Law Schools

In terms of the list of what makes a good lawyer, Canadian law schools have established a very creditable record in the areas of analytic skills and substantive legal knowledge, and are making some significant improvements in emphasizing lawyer skills and the interplay of other disciplines with the law.

Obviously these are rather grand and highly impressionistic assertions and we don't offer empirical evidence in support. Moreover, one should not ignore the importance of the fact that most university-based Canadian law schools have had a relatively short history compared to their American counterparts. Allowing for this, we feel, at the risk of immodesty, the accomplishments of the law schools have been quite significant in this respect.

(b) Some Shortcomings

Notwithstanding this creditable record, there are many areas of law school curricula and legal education which allegedly fall short both with respect to fulfilling their avowed objectives and strengthening professional competence in particular. The criticisms are well known and hardly need elaboration:

(1) The preoccupation with case law and casebooks, expecially in first year, despite efforts of most schools to introduce a perspective or overview course in first year.

(2) The *ad hoc* growth of various optional courses which appear to be trendy or fashionable and aggravate the alleged lack of cohesion among the three years of law school and indeed within the three years themselves.

(3) The failure to develop, even more than has been done to date, lawyer-skills courses despite various clinic programs that most law schools have already established.

(4) The failure to exploit the last year of law school in ways which could be pedagogically more attractive to students and at the same time adopt techniques and approaches which would improve standards of professional competence.

(5) The failure to have a systematic approach to the major components of legal education: law school, articling and the bar admission programs, although there are signs of activity on this front.

(c) Some Suggestions

What, then, can be done about some of these alleged shortcomings? Without any claim to comprehensiveness, we would suggest six areas for improvement.

First, we would emphasize the critical importance of example and the impact of law teachers as role models of what professional competence is all about. It must be recognized that what we teachers do is just as influential as what we say. If we expect close analysis, intellectual rigour, thorough preparation and genuine commitment to a task worth doing well from our students, we must be prepared to display these attributes ourselves in our teaching, writing, research and related activities. While it is, of course, true that as full-time academics we will most often not be involved in those tasks most commonly associated with the private practice of law, nevertheless the impact of a professional commitment to the law at an early and impressionable stage in the development of the lawyer would seem to us to provide an essential base on which a more technically professional competence can subsequently be built.

This equality of expectation may well have painful consequences. If we are prepared to weed out students who do not come up to our expectations, will we be prepared to remove colleagues who fall short of professional competence in teaching?

All this talk of "rigour", "commitment" and "close analysis" should not be taken as support for the bullying teaching tactics of Professor Kingsley in "The Paper Chase". At the same time, we are not unmindful of Professor Allen's warning as to the destructiveness of the "learning is fun" ideology. As he put it,

> Learning, in fact, is pain, at least in those aspects of it concerned with the indispensable discipline of basic drill. Paradoxically, learning confers profound satisfactions and the intellectual life is a kind of play. The pleasures, however, cannot be achieved without experiencing the pains. Modern technology has not discovered a short-cut to Parnassus.[11]

In moving to our second suggestion, we would refer you back to Professor Trakman's speech of this morning in which he, quite rightly, emphasized the breadth of the whole notion of professional competence. As he said, "[C]ompetence in law presupposes knowledge about man in society and about the control imposed by law upon man in society."[12]

In response to this concern, law schools have set up interdisciplinary programs of one sort or another. Now, we all know how difficult genuine interdisciplinary work really is. Of course we should no longer tolerate that rash of ill considered "law and--" courses which sprang up during that period when "relevance" was the prevailing buzz word.

At our school we have concentrated our resources to some considerable extent on "Law and Economics" with some apparent success. The key would seem to lie in the quality of the teachers involved who must be thoroughly competent in a particular discipline, yet, at the same time, must be capable of crossing disciplinary boundaries. The danger always to be guarded against is that interdisciplinary work will degenerate into non-disciplinary mish-mash.

If law school interdisciplinary work is to lay a basis for later broader professional competence, it is essential that it not be an isolated activity indulged in by an eccentric few in a separate institute or centre which just happens to be attached to a law school. The great strength we see in our Law and Economics Program is that it is fully integrated into the life of the school--in particular the teaching part of our program--and permeates far more widely than those courses specifically designated as part of the program. This may, at times, be somewhat disconcerting. For instance, a colleague of ours was once heard to express some amazement when two weeks into his contracts class, at what he took to be the resolution of a protracted discussion, a student chimed up, "Well that's all right, I suppose, as a legal solution, but is it an efficient solution?"

Our third suggestion would involve a greater resort to cluster and concentration programs. For example, our Third Year Business Planning Cluster gives students an opportunity to immerse themselves in this branch of the law. It provides a unique forum in which students may come into sustained contact with leading specialist practitioners to grapple with practical problems at a high level of professional competence. It also greatly helps to break down the barriers of artificial and misleading isolation of legal concepts into discrete courses which has been adopted over the years as a matter of pedagogical convenience.

The thrust of our fourth proposal was neatly summed up in the Report and Recommendations of the Task Force on Lawyer Competency: "On too few occasions is a student called upon to do and redo a task until a professionally acceptable job has been done."[13] This study went on to urge that there be more individualized instruction and more detailed critiques of student work.

Subject to the sobering constraints of shrinking budgets (a matter to be dealt with at the close of these remarks) we would urge that renewed emphasis be placed on legal writing requirements. Ideally, all students should have to go through the agonizing, but ultimately rewarding, experience of writing and rewriting a substantial piece of work under strict faculty supervision. We believe that law schools simply cannot afford to ignore criticisms that our graduates are incapable of precise and careful written work.

Our fifth and penultimate suggestion concerns the need to broaden clinical programs into areas other than poverty or community law. While law schools have benefited greatly from the initial drive for clinical programs from those concerned with the plight of the unrepresented, it would appear to us that it is time to consider whether clinical experience should continue to be confined to its original concerns. Why should it not be broadened to include corporate or commercial clinical law for example?

Our sixth and final suggestion concerns the potential role of law schools in continuing legal education. Here it is possible to envisage a continuing dialogue between academics and practitioners to the benefit of both. There could be substantial benefit for students as well. As one of us has written of his experience with continuing legal education at the Dalhousie law school between 1973 and 1976:

> It has provided members of faculty with a most useful opportunity to meet with practitioners active in their teaching areas. This is particularly true for those teachers in specialized areas who benefit greatly from such contact. In the inter-

> action between academics and practitioners each can gain--the academics by way of new insights into how the law works in practice and practitioners by way of an exposure to the broader approach of the academics.
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> * * *
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> Students can also benefit from continuing legal education. The committee has made a great effort to involve the student body in its activities, and a number of major papers have been presented by students. ... In addition students have been encouraged to sit in as observers and have done so in quite large numbers. In a number of courses the faculty member involved has incorporated attendance at a conference as part of the course itself and a number of faculty have recognized that students are particularly impressed when matters, which would otherwise be dismissed as "academic" are discussed by obviously successful practitioners. As well, it must be recognized that students are impressed by the fact that "real" lawyers are interested to hear from faculty. The greatest long term value, however, to having an active continuing legal education program at a law school is that it will impress upon students by example that the effective practice of law requires a long term commitment to education.[14]

(d) Some Sobering Constraints

We refer here to shrinking budgets, the danger of forgetting what we do best, and the need for law schools to reaffirm their commitment to scholarship and their knowledge-related mission.

Whether we particularly like it or not, we have to recognize that proposals for improvements in legal education, particularly those aimed at enhancing professional competence, will require a great deal of additional very expensive professional support. Consider interdisciplinary programs, cluster and concentration programs, improved legal writing requirements and broadened clinical education. Could any of these be undertaken except at considerable expense? Do we have any indication that additional funding will be forthcoming?

Nor must we lose sight of what we do best and dilute the present considerable strength of law schools in our enthusiasm for improvement. As we stated at the outset, "... Canadian law schools have established a very credible record in the areas of analytic skills and substantive legal knowledge ...." It is of the utmost importance that the resources for this core of successful accomplishment not be weakened. As that old song has it, we should "accentuate the positive and eliminate the negative."

Finally, we must always bear in mind that what we are talking about is university-based legal education with all that that entails. While we should be sensitive to current concerns for professional competence, we should not seek short-term popularity with certain segments of the practicing bar at the expense of our scholarly and intellectual obligations.

We share the concerns so eloquently articulated by Professor Francis Allen in his disturbing assessment, "New Anti-Intellectualism in American Legal Education", and can do no more by way of conclusion than bring his words to your attention:

> The new anti-intellectualism insists on what ... has been described as 'instantaneous practicality'; it is impatient with any educational activity that does not promise an immediate and discernible payoff in private law practice. It is concerned primarily with the 'how', not the 'why'. It displays small interest in the substantive issues that confront this society. It reveals a narcissistic fixation on the techniques of the law office and the courts. It views askance the role of the law schools as critics of the law and as sources of new law. It gives short shrift to the obligation of the law school, as an integral part of the university, to discover and communicate new knowledge. It scoffs at 'philosophy' as wasting students' time or as incapacitating them for practical affairs. It is not an interest in improved 'skills' training in legal education that identifies the new anti-intellectualism; nor is it the desire to equip students for a more humane and effective career at the bar. The essence of the new anti-intellectualism is, rather, the narrowing of interests, the rejection of intellectual and humanistic concerns, the militant assumption that the test of an educational endeavour is its impact on the law firm's ledger. It is characterized by confident but wholly unsubstantiated judgments about the contributions of particular educational experiences to professional proficiency.[15]

FOOTNOTES

1. CBA, The Legal Profession and Quality of Service, Report and Materials of the Conference on the Quality of Legal Services, 1979, p. 29.

2. John Swan, Continuing Education and Continuing Competence, Working Paper No. 15, Ontario Professional Organizations Committee, 1979, p. 3.

3. ABA Section of Legal Education and Admission to the Bar, Report and Recommendations of the Task Force on Lawyer Competency: The Role of the Law Schools, 1979, p. 9.

4. Leon Trakman, "Professional Competence and the Law: An Educator's View (Part I)," a paper prepared for this Conference, p. 1.

5. Paul Carrington, "The University Law School and Legal Services," 53 N.Y. U. Law Rev. 402 at 425 (1978).

6. [illegible]., at 426.

7. The Honourable Irving R. Kaufman, "Assuring Qualified Advocates in Our Courts," Address to American Bar Association Annual Meeting, Honolulu, August 15, 1974.

8. H.W. Arthurs, Book Review, 59 Can. Bar Rev. 232 at 237 (1981).

9. Herbert L. Packer, New Directions in Legal Education: A Report for the Carnegie Commission on Higher Education, 1972, at pp. 22-3.

10. Francis Allen, "New Anti-Intellectualism in American Legal Education," 28 Mercer Law Rev. 447 at 453 (1976).

11. Ibid., at 460.

12. Supra note 4, at 4.

13. Supra note 3, at 17.

14. H.N. Janisch, "Law Schools and Continuing Legal Education: The Dalhousie Experience," 55 Can. Bar Rev. 57 at 70, 71-72 (1977).

15. Supra note 10, at 450.

DEAN WILLIAM CHARLES
DALHOUSIE LAW SCHOOL

6

I. How is Law Relevant to Professional Competence--Other Law School Objectives

I will first try to respond to the points made in the basic paper by Dean Iacobucci and Professor Janisch and then offer some observations of my own.

The authors have, as they have been asked to do, directed their concern about law school relevance primarily to the issue of professional competence in the sense of legal practitioners who have been licensed to practice law. Their discussion is, therefore, not directed to nonpractitioners who may have legal training, and I believe it should be borne in mind that law schools can have more than one mission or objective as part of their attempt to discharge their social reponsibility. For example, law schools may strive to: (a) discover and transmit knowledge of the law, its institutions, and processes--in other words, to teach law as a discipline, (b) train lawyers--or perhaps less ambitiously--to educate persons who are becoming lawyers, and (c) to improve the system of justice.

Some law school graduates will not become private practitioners, but if recent statistics are meaningful at all, the vast majority intend to do so. Statistics for the class of 1981 at Dalhousie, indicate that 139 of the class of 146 sudents, plan to article and to become admitted to a provincial bar.

The authors raise several important issues in their discussion paper, but I am not clear where they stand on several of them. For example the following questions are posed:

(a) Can law schools do anything about incompetent performance that is the result of laziness, apathy, or bad character? If the question of competence is affected by the fact that, to some extent, competence is relative, attitudinal, and situational, can law schools improve standards by educational techniques or devices?

The fact that teachers are urged, by the authors, to practice what we preach, at least in relation to "close analysis, intellectual rigour, thorough preparation, and genuine commitment to a task worth doing well," means that the authors believe some attitudes can be promoted and developed by law schools. By requiring students to redo work until an acceptable product is produced, we do at least two things; (1) we indicate that nothing less than the very best should be striven for, and this involves hard work, and (2) we establish what is an acceptable standard of excellence. It is my view, that proper work habits or attitudes towards one's profession, call it pride of achievement or craftsmanship or disdain for half-hearted, sloppy work, can be communicated and students required to measure up. Whether the same students, given the distractions and pressures of practice, will remain true to those ideals, is another matter. In this regard, law professors

(b) Somewhat related to the question of the development of attitudes, is the basic question posed by Harry Arthurs and referred to in the basic paper. The question posed is: Are law teachers and law schools, really necessary?

The authors of our basic paper see the question as absolutely basic to the discussion on competence and conclude that for some purposes, such as imparting the knowledge of law and legal institutions, as well as developing skills in the application of that knowledge, we are directly relevant, but in other areas we are less so. The fact is, at the moment, we are the only game in town. By presenting doctrine in an organized way and providing various legal exercises, we develop skills of analysis, relevance, and communication. I would just like to reiterate my suggestion that law schools can also be relevant in developing attitudes as well.

(c) The alleged shortcomings catalogued by the authors, relating to the general law school objectives and professional competence, cover a wide area. Some of the weaknesses can be related to competence in a broad sense, such as a lack of a perspectives course in first year, while others seem to concern more specific aspects of competence such as the legal skills developed in a clinical setting.

The suggested remedies involve attitudinal development, interdisciplinary work and learning-by-doing exercises, in the process of which specific skills are developed. Several of their suggestions, for example, (3), (5) and (6), seek to envisage a closer relationship between the faculty, students, and practitioners, as a result of which greater understanding by faculty and practitioners of each other's problems emerge and greater understanding and skills are developed in students. It appears to be an acceptance of the proposition that law schools should try to develop more specific skills to a greater extent than is now attempted and the question is posed, but not answered, whether the clinical experience should be broadened. What is the answer to this very important question?

(d) Quite apart from the important issue of cost involved in teaching lawyering skills, whether by way of problem-oriented intensive question programs or clinical education, the question whether this should be done from an educational point of view is equally, if perhaps not more, important. If time and money were not critical factors, law schools could still pursue the traditional academic objectives involving the pursuit and dissemination of scholarship. Attention could be directed towards a critical evaluation of the existing legal system for purposes of reform, without any sacrifice; and law schools still superimpose or integrate more specific lawyering skills into the legal education program. Can we infuse more skill development and still retain our strength in the traditional areas? What effect will this have upon faculty? Will they, or some of them, cease to maintain their scholarly approach? Are the present faculty capable of engaging in the development of some kinds of lawyering skills? All these are questions that arise from a decision that law schools should try to develop these lawyering skills.

It should also be remembered that the whole question of competence takes place against the backdrop of an elective program in second and third year. Will a decision to extend clinical education and skills training require a more compulsory curriculum? While the authors raise the question of more extensive clinical education, they do not seem to answer it clearly. If the answer they would give is a positive one, then presumably law schools that presently do not have a broadly-based clinical component of their curriculum, are not as relevant to competence as are others that do have such programs.

II. Personal Observations: The Relevance of Law School to Competence

As I indicated at the beginning, we must realize that law schools can and do pursue more than one objective. I have suggested that some law schools could possibly pursue three. I would just like to review these objectives in light of the competence issue.

Some law schools (as in the U.K) concentrate upon teaching law as a discipline and leave the preparation for service at the bar to other institutions and programs. Between 1852 and 1873, when law faculties were established at Oxford and Cambridge, the notion was eventually accepted that law was scientific enough to be studied at universities. Albert Venn Dicey's inaugural lecture at All Souls College, Oxford in 1883, was entitled "Can English Law be Taught at the Universities?".

If a school were to take as its sole objective, discovery and transmission of law and the teaching of law as a discipline, the question of competence would only relate to the extent of the graduate's understanding of law as a body of doctrine with its related institutions and processes. There would be no attempt at skill development--perhaps not even legal analysis--except to the extent that an appreciation of legal reasoning by judges in rendering their judgments was communicated by the teachers to the students. Certainly no consideration of the practical skills of drafting, negotiation, or even advocacy, would be undertaken.

A school that tries not only to teach law as a discipline, but to embrace the additional objective of attempting to improve the administration of justice, would be taking a forward-looking approach and critically examining existing doctrines, procedures and processes with a view to changing them so as to improve them. This could conceivably also mean improving the general quality of legal services provided by individual practitioners. This, in turn, could involve the school with the question of the competence of the practitioner in terms of the usual ability to engage in legal analysis and the development of other legal skills such as drafting, negotiation, counselling, etc.

Most Canadian and American law schools, consider one of their main objectives to be the education of persons for the purpose of becoming lawyers, but few schools see themselves as providing a training that will enable graduates to competently practice law immediately. Being competent as a graduate, for most schools, means competent to go on to further practical training (such as articling or bar admission courses) for actually beginning the practice of law.

There is really no longer a debate whether law schools are relevant to competence issues. The discussion rather centres around what should be taught regarding skills and how best to do it.

III. Importance of Attributes and their Development

There are certain values, work habits, or personal attributes, that are invaluable for a variety of purposes, not just limited to the practice of law. The development of an inquiring and creative mind, an intellectual curiosity if you will, is extremely important. Thoroughness, a striving for excellence, pride in one's work, is also important. Anyone having learned these things will perform more competently any task undertaken. And an ability to self-learn is also essential.

For those who will eventually engage in the practice of law, in whatever position, a certain broad theoretical underpinning is essential for competent performance. An understanding of the historical development of the law, an appreciation of the role of law in society and the functioning of legal institutions and processes, will provide a broader perspective that will enable one to work more creatively and counsel more wisely. The ability to place the specific situation in the broader setting and in a larger time continuum--to see beyond the immediate task--should produce a more effective result.

If lawyers are seen as part of the governing mechanism of the state, as public servants whose function is, in a broad sense, political, stemming from the fact that private citizens cannot secure justice without the aid of a special professional order to represent and advise them, then it would seem necessary that such persons should clearly understand the importance of their role in a democratic society. The main implications of democracy and the role of a professional in that society, as well as some idea of our basic democratic values, should be part of the competence of such an adviser.

Thus, a broad understanding of the law and its function in society, as well as the role of the lawyer, is important, whether one practices law as a lawyer or merely undertakes the study of law as a social science discipline. However, a legally trained person is also expected "to think like a lawyer," a factor which is not necessarily crucial for someone studying the law as a liberal art subject, except, perhaps to the extent that an understanding of what thinking like a lawyer means may help the student to understand why legal decisions are as they are and why statutes are drafted the way they are. For a practicing lawyer, however, the development of a legal mind, with its emphasis upon logical analysis, fact relevance, etc. is one of the main aspects of competence and one that the law schools seem to be particularly good at developing. But a lawyer must also perform a variety of very separate and distinct tasks requiring, in some cases, special knowledge and special skills. Being able to think like a lawyer will not necessarily enable a lawyer to perform specific tasks competently. The ability to draft a will or devise an estate plan or to litigate an action in the trial court, will obviously be enhanced by the ability to think like a lawyer, but certain aspects of the specific task may not be competently performed without the required specialized knowledge or skill. The main argument at the moment seems to centre around the extent to which law schools should be responsible for developing these more specialized skills.

It is generally accepted, I believe, that for learning purposes it is beneficial to give students the opportunity to apply their knowledge in specific situational settings. It is also possible that this kind of learning exercise could also be used to develop specific skills necessary to the application of knowledge in a particular situation. To the extent that skill development can be achieved as part of the learning experience, problem solving in practical settings would seem to be advantageous.

However, we must also consider the costs that are involved in providing the student with an opportunity to apply his knowledge and develop specific skills as part of the learning process. This will normally require smaller groups and more interactive time between student and instructor. It also raises the question whether present academic staff, many of whom have not had experience in the practice of law, will be able to devise the necessary problems with a realistic setting that will enable the development of the skills mentioned to take place. Will the character of the faculties change as a result?

IV. Conclusions

(1) I think law schools are relevant and individual professors do matter and that they are essential to a good legal education.

(2) Quite apart from effective transmission of information, development of a legal mind or legal approach, and other ancillary skills, the most important and relevant things law schools can do is to project important attitudes of excellence, thoroughness and craftsmanship.

(3) To the extent that clinical education allows a student to apply legal knowledge and allows him or her to see its relevance to the solution of problems and how the legal system operates, it is a positive development and should be encouraged. To the extent that lawyering skills can be developed as part of some other exercise and without adversely effecting the traditional academic role of the law school, they should also be encouraged.

PROFESSOR GRANT HAMMOND
DALHOUSIE LAW SCHOOL

It is not possible, in the time alloted to me, to discuss the general issue of the "relevance" of law schools. So I want to talk about three specific things. First, the impact of new technology and knowledge on lawyers. Do lawyers know enough about the right things to ensure their continued relevance to the new world? Secondly, the concurrent problem of faculty obsolescence and the question of how we can evolve scholars and teachers who can identify the implications of the new knowledge, contribute understanding and solutions and train the new practitioners. Third, I want to speak to another distinct topic: legal ethics and the role of law schools with respect thereto.

We live in an extraordinary society in Canada. I might perhaps, for the benefit of some of our American participants, mention a few statistics that they are probably not familiar with. Sixty percent of the Canadian Gross National Product is derived from information-related activities. The structure of our work force is such that more than fifty percent of Canadian Labour is engaged in the production, sorting and the use of information. Those persons earn fifty-three percent of our labour income. Those statistics incidentally are something like five to ten percent higher than the equivalent figures in the United States. We are, in a phrase, the nearest country in the world to the intellectual construct of an "information based economy". Again, just by way of comparison, cable penetration in this country is something like sixty-five percent as against say twenty percent in the New York market. A staggering ten to fifteen percent of first capital formation is going into these kinds of activities in this country. We already have in place in one province in Canada an interactive information system. Saskatchewan is the first geographical and political entity to have such a system.

In an economy of this kind, some very strange kinds of thing start to happen. There is the very obvious problem that the whole technical infrastructure changes, giving rise to the consequential problem of the application of new technologies right across the whole range of that infrastructure: media, transport, government, finance, energy, matters of that kind. But more than that, there arises a bewildering series of socioeconomic and legal problems that are with us now in no uncertain measure. Firstly, there is the divorce for a very large percentage of the population from the more physical aspects of industrial type activities. Secondly, there is the massive increase in the bureaucrization of society. Thirdly, information becomes a "currency". (A phenomenon, which has been little explored). Fourthly, and perhaps of the most interest to a lawyers, there are likely to be extraordinary changes in the formal ordering in society. Instead of, for instance, great concern with industrial organization as such and hence labour law and relations, competition policy, ordering of financial markets and the like, there are strange new issues, such as access to information. How are issues such as these to be handled? And what is more, with all due respect to the University of Chicago, old concepts simply do not work anymore because as we are beginning to appreciate, information simply does not behave in a commodity like manner. It behaves like a collective good, it becomes a resource. Thus what is at stake is something which has been termed: "the learning capacity of a nation." There are a number of other effects, but perhaps the most obvious pragmatic effect is the breakup of the technology bound legal and institutional categories into which we have previously fitted things. And the result of that in turn is the total absence, at both the national and the international level, of any kind of agreed conceptual framework. What we end up with is engineers, social scientists, economists, lawyers and legislators all operating without any kind of common language against this strange new background. Consequently, as one might expect, a huge block of legal learning simply goes out the window. It is inappropriate against the new construct. Notwithstanding that we somehow sense a new and all-pervading relationship between social structures and patterns of communication, between information and power, we have not been able to respond intellectually to this new phenomenon, which is, after all, a transformation of an enormous qualitative nature affecting every aspect of society in the most fundamental kinds of ways. I emphasize this is not the world which will be. It is the world in which we live now and that leads I suppose to the direct question: "What have we as law schools done by way of response this extraordinary phenomenon?". Collectively, I think, the answer is, very little; individually, some modest efforts. For my part, I am troubled. I cannot accept that any notion of reliance on the market, for instance, to produce social accommodations to the new knowledge is adequate, particularly when the proposed uses of such knowledge are potentially destructive of basic human values. So I put the issue to you this way: that one challenge, at least if we are to remain relevant as legal educators, which we have not yet met in any acceptable measure, is to provide an educational discipline adequate to identify these kinds of issues, supply the knowledge and the techniques that are necessary for thought and understanding and perhaps some kind of basis for social action. That perhaps leads me into the second question.

Obsolescence, of course, is a term which is commonly applied to technology and, of course, rapid obsolescence is another given--it is another characteristic in the kind of society which I have described. This poses enormous difficulties for the practitioner, but I want to talk, and I hope the practitioners amongst you will excuse me, about faculty obsolescence. In any institution, as some management experts have suggested, it is impossible to achieve less than twenty percent "dead wood" (i.e., personnel suffering from obsolescence related problems, physical or emotional problems). The range of "dead wood" within all institutions is said to be somewhere between twenty and thirty percent. Thus the margin for real competence is apparently very small even in the best run companies, the best run law faculties, the best run law firms.

How can we as law teachers deal with our inevitable obsolescence? Firstly, it does seem that self education is not going to be enough. The effort by North American legal academics in particular has been massive but it clearly is not going to be enough. Totally new methodologies will have to be learned and relearned. This may suggest that career patterns and reward systems may need to alter. Secondly, it does seem to me, and this is a theme that will be taken up in the Learned Societies Conference next week, that existing patterns of graduate legal study will have to change. In my view the whole field of graduate legal studies in North America has been woefully neglected. I appreciate that is a very serious charge to make against a number of well-regarded institutions; but it seems to me that is the hard fact of the matter.

Thirdly, it seems to me that institutional arrangements will have to change, for both teacher and practitioner, I might add. It does seem that it is going to be necessary to make institutional arrangements within both faculties and firms which will enable lawyers to "re-equip themselves". Otherwise we run the very severe risk, as a profession, of being totally irrelevant.

The third matter that I did want to advert to is the place of legal ethics in a law school. I had occasion recently to write a report for the New Zealand Law Society as to what should be done about professional competence and I did try to summarize my views on legal ethics in that report. I hope you will forgive me if I read some portions from that report. My basic position is that the teaching of legal ethics or professional responsibility should elevated to a major and mandatory course in the LL.B. program and I would in effect "take no prisoners" on that particular matter. I am not impressed by arguments that the subject cannot be taught or concerns about coercing people into taking ethics courses.

> Legal ethics has been a "practical" requirement for bar admission purposes for some years. Traditionally it has been taught on a largely expository basis by practitioners and retired judges over a short lecture series. There are essentially three problems with that approach.
>
> Firstly, legal ethics should not be just a course where a survey is made of how the disciplinary rules have been interpreted in law society proceedings or by rulings by the courts on the proper conduct required of the bar. What is needed is exploration of the fundamental values upon which the legal system and the profession rests in the hope that future students can avoid that shallow grasp, or often a total failure, to apprehend the moral underpinnings of our legal system. In this sense the course needs to be much closer to what the Oxbridge colleges would term moral philosophy, but in the legal context. For instance, are contemporary students aware of historical and contempory thought on even the value of freedom for a legal system? Awareness of the foundational Enlightenment view that without freedom one cannot function as a moral agent and the contemporary expression of that theme--that the development of a healthy personality and society is ultimately intertwined with one's ability to act freely--gives important content to the value of freedom. Without such a firm root in reason and experience, such values can be treated more as sacred entities to revere and preserve for their own sake, rather than as valuable commodities that we need for a well functioning society and legal system. Without this content, erosion of these sort of fundamental values cannot be understood as being a threat to the healthy development of society.

Secondly, High Court Judges, District Court Judges and practitioners may not be the best people, however well technically qualified, to undertake such a course because it is their values which are under the microscope. The scholar's detachment is required.

Thirdly, even when consideration is given to the issue of legal ethics in the sense of disciplinary rules (which should not of course be ignored), it becomes clear that the profession as a whole has never given adequate attention to the hard issues of professional responsibilities of lawyers. The most difficult issues have been ignored or avoided. One way avoidance takes place is by the kind of simplistic generalisations often heard at bar admission speeches. "A lawyer should never do anything that a gentleman would not do." A more formal evasion consists in issuing statements or codifications which give lip service to basic systemic values, while entirely ignoring the way in which those allegedly fundamental values are at odds with one another. Thus, the criminal defence lawyer is required to know everything about the client's case, maintain that knowledge in the strictest confidence, and yet, at the same time, be candid with the court! The net result is that the Law Society rules are as much help to the practicing lawyer in the courtroom as a valentine card would be to heart surgeon in an operating room.

An institutional framework and ethical rules designed for the service of the law's traditional clients with their ready access to legal services cannot today satisfy the profession's responsibility to the client born of more recent social developments. The task may be nothing less than to purge the inbred precepts of another day, rethink the various codes, and reshape internal mechanisms for the meeting of public responsibilities.

There are a number of reasons for the persistent failure of the profession and the law schools to give proper consideration to the profound questions of legal ethics. First, the problems are both intellectually and operationally immensely difficult (which presumably ought to constitute them a suitable subject for investigation by university scholars). Second, there is a curious assumption that people will automatically do the right thing, or, if they will not, that there is fundamentally nothing that can be done about it. Yet a third reason is a real measure of intolerance towards any suggested departure from assumed, yet unarticulated, norms.

Considerations of the proper scope of professional responsibility and legal ethics are entirely suitable for in depth study, are directly relevant to the genuinely critical cases in a lawyer's life, cost very little in monetary terms, and integrate easily with interdisciplinary work. They should be greatly expanded.

Perhaps this is an appropiate note on which to finish: if the time I had in practice (some twelve years) was any kind of guide to me, there comes a time when the intellectual and technical problems of the law become less of a concern. The reason is straightforward: basically law is not a difficult intellectual dicipline. It does not compare, for instance, with quantum physics, it does not compare with economics. But what is difficult about the law are problems of choice. Too often we parade our intellectual facade and we avoid going directly to the very things which are the heart of so many "legal" questions: the difficulties of evaluating choices and the ethical issues raised thereby. Law schools clearly have a critical role in that discussion if they are to remain "relevant."

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Introduction

On a more serious note, in this paper I shall attempt to raise further questions about the relevance (heavens, I thought the word died a natural death about 1969) of legal education to the achievement of professional competence in law. I assume that the principal discussants have been asked to assess the effectiveness in 1981 of university based law schools as a vehicle for engendering professional competence. As I see it, therefore, my task is neither to laud nor to revile legal education as it is practiced and preached today in Canada. Rather it is to suggest what is at stake in the debate, and to inquire if some of the most important questions about the contribution of law schools to professional competence are not being asked or are being assumed away. Not the least significant of these is, unfortunately, are law teachers competent?

Before proceeding, however, I should like to offer a general disclaimer arising from Professor Janisch's comment following oral delivery of this paper. He noted, only half in jest: "Never in the history of legal conferences has the obvious taken so long to present." So I shall confess at the outset: nothing in this paper is really new; most of all the examples are probably trite; some of the elaboration is no doubt belaboured. Yet all of it needs to be said and needs to be said repeatedly until we in the law schools consistently practice what we preach. For this reason I shall be arguing only a very narrow thesis which should not be mistaken for a view of the whole; to others I leave the task of developing complementary aspects of this afternoon's topic.

On the Education of a Competent Lawyer

As several speakers have observed earlier in this conference, an answer to the question "What is a competent lawyer?" assumes a conception of what a lawyer does, which in turn assumes a conception of law. Professor Trakman puts the problem directly when he asserts: "Understanding the meaning of competence in law presupposes an understanding of the meaning of law itself." In this essay, the question will be cast in a slightly different manner, for I believe that the issue is not so much "What is the meaning of law?" but rather "What is the nature of legal knowledge?" In other words, "What does the professionally competent lawyer claim to know that others, including incompetent lawyers, do not know?"

Admittedly, it is not difficult to slide from the question as rephrased into a response which rests on a dualistic view of knowledge reflected in the dichotomy of theory and practice. For example, some claim that the lawyer must, first, know the law, and second, know how it operates. Professor Trakman has taken this avenue to demonstrate that the conception of lawyer as omniscient, omnipotent and hence omnicompetent is a myth. Yet as a vehicle for advancing our understanding of competence, and the contribution to its achievement which can be made by law faculties, this response does not take us very far. One still must determine "What is the law?" and "How does it operate?"; and both of these are vexing jurisprudential problems unlikely to be resolved in a conference such as this.

My suggestion is that we pursue the question "What is the nature of legal knowledge?" by seeking various insights of competent lawyers, be these government solicitors, corporate counsel, labour arbitrators, law teachers, private practitioners, judges, politicians, poets or whatever. The awareness I have in mind is not comprised by run-of-the-mill abilities flowing from the definition of competence elaborated in the ALI-ABA Special Committee on Continuing Professional Education: substantive knowledge; technical skill; efficient management; awareness of limitations; adequate preparation; and intellectual, emotional and physical capacity. It is made up of insights which may not at first impression seem to be contemplated as staples of traditional legal education, and which presumably would not be encompassed within the definition of law assumed by many of legal education's severest critics. In my view, the best way of assessing the contribution of law schools to the achievement of professional competence is not by asking how well they teach the law as defined by critics and "after dinner speakers"; it is by asking how well they teach what law is like, as understood by competent lawyers.

(i) the limits of legislation and adjudication as mechanisms of social ordering--the myth of theory and practice.

Let us begin by asking why lawyers, whose education has been primarily directed to the activity of legislatures and courts, can nevertheless be quite sensitive to various other decision-making processes which we find in modern society. Why do lawyers have the ability to help parties to solve disputes using such differing techniques as contract, mediation and arbitration by a third party? Why do they recognize the importance of customary interactional processes, a wide variety of voting procedures and deliberate recourse to chance in structuring the affairs of their clients?

This is a seemingly theoretical aspect of competence, involving an awareness of the strengths and limitations of several decision-making processes; but it encompasses highly practical abilities as diverse as knowing when to sue and when to settle, when to draft a contract and when not to put an understanding in writing, when a phone call is better than a letter, when a legislative rule is required, when casuistic development of a point is preferable, and so on.

Can this insight be taught in the law school? Really I am asking if law teaching must necessarily have its focus on appellate cases and statutes, perpetuating the twin evils of litigation mania and hyperlexis. I believe that the much deprecated city hall "fixer" can be no less a lawyer than the Supreme Court advocate. And a good legal education ought to prepare the former as well as the latter to recognize the appropriate realm for his preferred activity.

Let me offer an example, drawn from a course in Wills and Estates, of this insight which can be kindled even in the most traditional of law school subjects. It is derived from Lon Fuller. Suppose, in the liquidation of an estate, there is a bequest to two persons of a one-half interest in the antique furnishings of a house. The executor asks how he is to proceed with distribution of the assets. Naturally, at first students suggest that the matter be referred to the Court for decision; but upon reflection they realize that this is not a problem which lends itself well to adjudication. How does one value the items? Are some more valuable if kept as a set? Are some more valuable to one person than the other? Who gets first pick?

With some prodding they then come to suggest that perhaps a settlement should be negotiated, although scepticism about the parties' abilities to work out an agreement without outside guidance usually leads to the abandoning of this proposal. Adjudication of the dispute will not work because the issue is too complex and there are no rights to be determined; contract will not work because the problem has no structure. There seems to be no way of liquidating the estate short of selling the assets and dividing the proceeds.

At this point I tell the story of how my father used to help my brother and I resolve disputes such as how to cut up a candy bar or divide a piece of pie. The rule was "oldest cuts, youngest gets first choice." Here, our father had solved our problem, not by imposing a solution upon us, but by giving us a structure within which we could solve it ourselves. Rather than dividing the candy bar himself, which would increase our dependency on him in the future, he gave us the tools to assert our independence.

I should add as an aside that I was initially baffled when one student responded to this line of inquiry with the question: "What do you do when there are three children?" (My sister never got to share in our candy). Yet a creative solution to this variation soon came from a classmate: "Buy a box of smarties!" In other words, reshape the problem into a form which is amenable to an acceptable solution. And ultimately is that not what one is doing by converting the assets into cash?

The fact that competent lawyers routinely are able to bring this kind of insight to bear on the solution of everyday problems might lead us to ask if this knowledge is theoretical or practical--if it reflects the law in books or the law in action. In my view, however, the above example shows that the theory/practice distinction is meaningless as a test of the relevance of legal education. On the one hand, we should recognize that an idea which is "good in theory but bad in practice" is an idea which is theoretically unsound; on the other hand, those who argue for practical education often fail to realize the complex theoretical structure which supports their vision of practice. After all, practicality, concreteness and reality are not simply out there; they are intellectual constructs. Education may be good or bad, but not because it is too theoretical or too practical.

(ii) sources of law and legal justification--dilemmas of fact and values

It is also worth considering why lawyers, whose schooling is founded on the self-congratulatory ethical attitude of legalism, are able to adopt a more catholic view of legal justification when dealing with clients. Legalism is the belief that right conduct is a matter of following rules, and that consequently there is no external referent either for the moral conduct of lawyers or for the justice of decisions. Yet lawyers know that the legal rule is only the beginning of argument, and that legal decisions, like all decisions, are justified on a variety of grounds. Truisms such as the importance of good facts, the right judge, hot issue, easy client to sympathize with, and so on, attest to this awareness.

Notwithstanding almost exclusive law school emphasis on precedent and legislation as sources of legal rules the practicing advocate daily builds his justificatory argument on several other foundations: the generative ideas of one's legal tradition; social, economic and political context; custom; prerogative or fiat; the experience of other jurisdictions; doctrinal sources; values; and agreement or reliance. Not surprisingly, the exclusively fact-centered dictates of legalism offer little orientation to the lawyer whose practice encompasses such value-laden activities as knowing his judges, pleading the equities, building precedent files, keeping up the contacts, and reading the market.

Is the classroom an appropriate forum for inducing this insight? My claim here would be that the direction of legal education need not always point towards the inculcation of finite rules. Ideals and judgment are as much the raw material of law as the ratio decidendi or the statutory definition. Effective law teaching encompasses both.

Might I suggest another example illustrating how students can be helped to acquire the above perspective, this time from the field of Secured Transactions. The problem I owe to Ian Macneil. Suppose a company cannot meet a contract with a supplier because its products are not selling well. It wishes to renegotiate the deal, offering possible future orders in exchange for a release. Should the lawyer for the supplier insist on performance invoking the legal rule pacta sunt servanda? At first, students feel he should; yet when questioned about factors such as industry black-balling, an unsecured ranking upon bankruptcy, loyalty to a long-time customer, or commercial practice in that particular sector, they begin to see reasons for not demanding performance. Sometimes relationships are more important than promises, a point married students seem particularly adept at grasping.

Moreover, a dissection of the litigation process sows further doubt. Could one be certain that a court might not invoke a doctrine of mitigation or unconscionability, or that it might not find a term of the agreement ambiguous, or find, as in the classical battle of the forms case, "no agreement"? When predicting a judge's reaction it is not unhelpful to remind ourselves of the story of Shylock, of Lear and of Prospero.

Students who begin discussion convinced the law is clear and that one should insist on performance invariably wind up sceptical about how clear the law is and sensitive to the fact that on the law, but a very different conception of the law, one might not wish to sue. Only on examinations and T.V. shows can one afford the luxury of pointing to a case or statute and proclaiming "This is the law!"

The fact that much of the learning of lawyers goes well beyond the content of legal rules ought to make educators consider if this is the knowledge of the law which is contemplated when people complain that some lawyers don't have enough of it. It seems to me that the above example reveals that the legalistic perspective is flawed in that it presupposes an artificial distinction between law and non-law. The former is thought to be definable as a datum, the latter as whatever is left. But, we should remember that definitions are neither true nor false, only helpful and useful or not. Defining law restrictively neither relieves the advocate of responsibility for the justice of his conduct nor permits him to ignore justifications other than legislative rules. It only obliges him to account for non-law as well as law in his work. That is, regardless of definitions and labels legal education must attend to matters beyond the concerns of legalism.

(iii) law as a means of social control and as a catalyst of human interaction--resolving disputes by producing conflict

From another perspective one might wish to consider how it is that lawyers, who have spent their time in the classroom reading and discussing judgments, manage to overcome the commonplace assumption that law and legal institutions are primarily remedial and oriented to dispute-settlement or dispute-avoidance. Why do they know that law is also a dispute-producing mechanism, which through its very structuring of human events directs our attention to problems and conflicts previously unarticulated? Why do they see that in generating new perceptions and new problems, law facilitates private ordering by bringing these to consciousness where they can be identified, argued about, recast and resolved?

Competence in this sense, contemplates that the lawyer can view a problem from many angles, find new ways of presenting old grievances and help his clients articulate these. By being aware of his own reconceptualizing biases, he is able to overcome his tendency to see car accidents uniquely in terms of fault, causation, and damage. By seeking to understand the deep structure of the law he highlights questions the law does not ask, and helps pose these when he feels it should.

How successfully can legal education serve to engender this insight? The tradition of denying the importance of all else in order to ensure the purity of one's own discipline is endemic in law school. Nevertheless, despite the protestations of the teachers of discrete subjects to the contrary, the legal system, like all systems, is integrative and interactive.

From a third course, Administrative Law, let me give an example of how students can be encouraged to think beyond received categories. The idea for hypotheticals of this nature I owe to Karl Llewellyn. Imagine a problem involving a pre-teenage girl who is refused permission to play on a local boys' minor hockey team because of her sex. (Originally I had cast this example in terms of *Harrison* v. *Carswell*, but in view of a comment that I was picking an easy case to make my point, I have substituted here a different fact pattern based on *Cummings* v. *Ontario Minor Hockey Association*.) The dispute gets to the Supreme Court. What is it all about? How is it argued? Initially, and I assume partly because the course is called Administrative Law, students say it is a Human Rights problem.

With prodding, however, the issue can become one of the limits of judicial review of administrative action or, given the distinctive and contrasting processes of courts and agencies, the respective merits of adjudication and inquisition. Students sense some accomplishment in this exercise of legal recharacterization, but begin to feel uneasy when told that a similar case was first argued in terms of private property and freedom of contract. For once the discussion moves beyond labels which can be attached to courses, legal training seems less helpful.

Unease turns to panic when the adventurous begin suggesting that the real issue is one of "the protestant ethic" or "the *me generation*" or the involvement of parental prejudices in a child's moral development. Ultimately, discussion turns to voluntarism, socialism, and the proper limits of state activity. Students who want to believe that the law has only one way of looking at every problem come to see that by providing structures for resolving disputes the law also provides vehicles for producing disputes, for allowing problems to be seen in a new light, and for suggesting means of resolving them that do not even implicate legal institutions.

It should be no surprise that good lawyers see these complementary features of law. But is this what the social engineering critique of legal education has in mind when its proponents suggest that teachers take a functional approach to the law. I would argue that the above example shows the limitations of the law as a means of social control approach, for it reveals how law rarely solves any dispute without stimulating others. By framing events in a discrete way, by highlighting certain individuals as appropriate litigants, by identifying a range of acceptable solutions, law serves as a catalyst of human interaction. Consequently, legal education must bring home to students the varying contours of social activity and cease deprecating the other bonds of modern society.

(iv) the letter and the spirit--symbol and metaphor in legal language

Notwithstanding the literalism of much legal education, most advocates know what the language of the law is to be understood metaphorically. Why do they understand that legal rules are neither mere superstructure, operating independently of their socio-economic substratum, nor the absolute imperatives which crucially determine human action? Why do they appreciate that law is a complex social symbolism, and that legal language operates as part of the matrix of other symbols such as art, music and literature?

Insofar as legal language is concerned, competence implies an awareness that the metaphorical use of concepts such as regulation, covenant, alienation, marriage breakdown and the like has been a powerful generator of legal activity. Because it functions as both sign and symbol, as label and fiction, legal terminology has only a limited truth value for the advocate; the lawyer must always be most interested in what legal materials can mean, not in what they say.

Should we again rhetorically ask if legal education can foster this element of competence? In recent years exercises in case analysis and statutory interpretation usually seem to result in the attribution of "core meanings", the last defence of literalism. Yet, despite a belief by law teachers that only through such devices can they assert the superiority of their own knowledge, the practice of legal education proves the opposite.

As a means of stimulating students to move beyond literalism in their thinking, I shall trouble you with one more classroom example, this time drawn from my Jurisprudence course. The problem is worked up from a suggestion of Christopher Stone. Let us take the word 'person' and ask what its linguistic content might be. At first, most students consider this question trivial; everyone knows what a person is. Surely there is no interest in pursuing dictionary definitions of common legal concepts.

However, the exercise seems less ridiculous once several current usages of the word are canvassed. Article I, section 2, paragraph (ii) of the U.S. Constitution begins "No person shall be a representative, ..." Were aliens, women, slaves, Indians, non property-holders, children, convicts and a host of others considered persons at that time? How many of these still are not considered persons today? Or again, we might ask what kind of person is contemplated by the common law offence exposing your person? Or by the expression personality? In the law of torts, do we not say that the striking of someone's clothes or objects closely allied to his person constitutes a battery? Would kicking a paraplegic's wheel-chair count as an actionable attack upon his person?

Moving from examples where the common law and statutes already have employed the word in a particular context students then are asked to consider the extent to which discussions about abortion and euthanasia are shaped by employing the word person to describe fetuses and totally incapacitated victims of severe accidents. After working through these various intellectual and physiological understandings of the word person, students no longer are disposed to consider the question trivial.

At this point they are then challenged to decide what legal significance should be attached to linguistic developments such as "chairperson", "Huperson Rights Commission" or "ombudsperson." No doubt each of these will emerge in some form in law as a sign that a changing society implies a changing vocabulary, which in turn produces a changing law. But we should remember that not so long ago the legal usage of person so as to include women was an important symbol in the struggle to change social practice. I often wonder if books like Vining's Legal Identity, the Dorian Gray of legal literature, are not our most valuable doctrinal resources.

Appreciation of the subtle sense of language demanded by the law should compel us to think about whether this is the lesson of literalism or literature. Legal language is not discrete and divorced from society, imposing its prerogatives on how we live our lives. Rather like all language it allows us to symbolize and to communicate. Yet, legal language is also not as malleable as slang and argot. The custodians of legal language, lawyers and judges, preserve the symbolic coherence of the law through values reflected in the vocabulary of legal expression. Perhaps law professors constantly need to be reminded that the word education is derived from the latin verb "educere."

(v) knowing the meaning of competence--the paradoxes of being and doing

The final idea I wish to discuss bears directly on the meaning of competence. Why do good advocates, who spend three years in the classroom reading about the law, not fall victim to the intellectualist fallacy; that is, the view that acquisition of legal knowledge and its efficient deployment are only skills or techniques which can be learned vicariously? Why do they understand that knowledge is never separable from its titulary end, that despite its claims to scientific objectivity, law is truly a humanities subject?

In the above sense, competence in the legal profession means that some aspects of know-how must be learned experientially. Thus, the desire to discover becomes the first step to competence. Nothing leads to degenerating levels of competence more surely than passive and uncritical acceptance of other people's learning.

Is the law school, apparently dedicated to inculcating the wisdom of past generations, any place to help students acquire this perception? Here, the question being asked is whether the nature of formalized teaching and learning itself precludes any institution from imparting know-how. The Academy is preoccupied only with a relatively limited kind of knowledge--intellectual analysis of predigested material. But good legal education, like good education in general, encompasses the liberal ideal expressed by Terence.

In exploring how faculties may reprofessionalize themselves, let me offer a last example which, mercifully, does not come from a specific course, but from the business of teaching itself. Francis Allen helped me first to see this point. Students often ask about parity in Faculty Government and tokenism in student representation. In considering a response, I am struck by the fact that no matter what changes have occurred in previous years, no matter how thoroughly the issue has been convassed, generation after generation of students will raise the question of representation.

Maybe this shows that education and teaching involve continual rethinking and rejustifying all that one does, not just to one's students, but to one's self. From this viewpoint, a student call for parity is not so much a grab for power as a cry for participation and an opportunity to learn more about law by doing law. Parity is not the issue; the process is.

Were we to consider the law to be a datum to be observed and reported we could dismiss these preoccupations of our students as irrelevant to the scientific pursuit of knowledge, to thinking like a lawyer. Yet are we serious when we say to a student: "Your mind is mush. Forget everything you have learned prior to law school. Here you will learn to think like a lawyer." If a student genuinely forgot everything--grammar, vocabulary, mathematics, how to read and so on--what could we teach? What would our appeals to "this doesn't make sense" mean? But, if we really mean "forget some things" should we not be prepared to justify our criterion of selection? The knowledge we impart to our students is only partly obtained in the classroom, for neither student nor professor can ever master intellectually everything that competence requires. He can only master a vision that everything is important.

Law--dealing with persons, not objects; concerned with meanings, not occurrences; focussed on understandings, not explanations--cannot be studied as one would memorize the contents of a dictionary. It can only be pursued as a career by teachers who have time for literature, art, music, dance and other activities through which man creates and shares his thoughts and ideas. More importantly, it should only be pursued by teachers who are willing to use faculty committees, law journals, moot court boards, group adviser programs, research assistant opportunities for students to understand the fallacy of intellectualism.

Let us try to discover why the best advocates know that professional competence is found in the desire to discover and the effort of discovery. Surely it is not because they seek to master the trivial present rather than to reflect upon the past and future. Each year I put the following question to students at the time of convocation: "Do you think your definition of law today is different than it was when you were fourteen? That is, do you still see law as being about rules, set out by the legislature, and applied by courts?" When the overwhelming answer is yes, I then ask: "Would a biologist, mathematician, artist, economist, or doctor respond in the same way about his or her chosen discipline?" Dare one put these questions to law teachers?

Conclusion

There is really little to add here by way of conlusion which has not implicitly been canvassed. Ultimately, I believe that professional competence is an attitude rather than a state; it is a critical awareness of what one is doing and why one is doing it. There is an important place for legal education in nurturing this attitude. In the examples given I have tried to show how the Law Faculty may contribute, perhaps more than heretofore, to the goal of achieving professional competence. The development has been intentionally dialectical.

I have tried to take insights which are relatively non-controversial components of legal competence and show how, in the context of ordinary classroom teaching, a sense of their importance can be demonstrated. In doing so I have also attempted to indicate how traditionally based legal education can actually assist students to acquire these insights. But more importantly, my concern has been to argue that many standard beliefs about law will have to be cast off: the dualism of theory and practice, legalism, the view of law as a means of social control, the ordinary language theory of meaning, and intellectualism all should be carefully reconsidered. Ultimately the thrust of this paper may be reduced to a single premise: a willingness to re-examine assumptions is a prerequisite of true professional competence; it is also necessary to answering the question how legal education can best serve the goal of engendering professional competence.

But, in the final analysis, we should remember that only individual lawyers, not some abstract entity called the Law Society, can be competent or not; only individual law teachers, not some abstraction called the Law School, can be relevant or not. There is no escape from personal responsibility in structure, in methodology or in institutions. Professional competence, for teachers just as for lawyers, is personal competence, and in this sense all arguments must be ad hominem.

DISCUSSION

Dean Charles: Are there any comments from the floor? Does anyone wish to debate the question whether law schools are relevant?

Professor Claude Fabien (University of Montreal): I am by no means an expert, I am just a concerned ignorant. That is why I am here this afternoon. I have been facinated by acrobatic flying that I have been witnessing; but I have to confess a fear of flying and I am trying to get back to the ground and to basics. There are two points of reference for me that are of much importance. They were implicitly present I think-in everybody's mind. Those two poles are, on the one hand, society, and on the other hand, our students.

Firstly, I will deal with society, and come to my question. The real test of competence or one of the tests of competence for me is the ability to respond to the needs of the society in terms of legal services. (Now , I speak about legal services in a very, very broad manner. It can be how to draft a proper law or to represent a poor person in court, or even to teach or research.) What exactly are the social needs? I think it is a very basic question, a difficult one, and it is made more complicated because we have to answer not only for the present, but on a forty-year perspective (which is about the average professional life span of the students we are preparing). Now we have heard the opinion of the various speakers, either explicitly or implicitly, on what those social needs are. But it seems that they are based mainly on intuition and *a priori* judgements and also upon personal experience. My question is, or my concern is, "Is there a scientific methodology by which social needs can be assessed, that is, social needs as they are now, and with a projection, for the forty upcoming years?" Now, I want to point out that this is a problem that faces many of us nowadays. Any faculty that goes through a revision of its curriculum is stuck with this kind of question. The Arthurs Committee on research in teaching that is now under way in this country faces this problem. What legal research is relevant? (And the test of 'relevant' is in relation to social needs.)

Now, I come to the second point of reference, which is our students. How should faculty react to student demands? Now supposing that we all agree between us this afternoon about what a competent jurist is. We have to go back in the classroom and sell our conclusions to our students. And our students may have their own opinion on those matters. Now, there are two types of reactions that a faculty may have to student demands, or to the view that students collectively have about what a competent jurist is. One is by bending to student views, the other one is by resisting and imposing your own view. We have seen a lot of bending in the past years, I would suggest--especially during the 70's--because of the student unrest. It is not written anywhere; but I think that law faculties witnessed the subtle ways in which some standards were lowered, the subtle ways in which some courses disappeared from the curriculum simply because there was nobody left in the classroom. I refer here to courses like jurisprudence, legal theory, philosophy of law, comparative law, introduction to the legal system and other very basic courses. The other attitude or reaction is by resisting this student view and imposing upon them the notion of what the faculty believe a competent lawyer is. This approach may be criticized as a very paternalistic way of dealing with the problem. In addition, the faculty is still faced with the problem of defining the views it wants to impose onto the students. What kind of justification can a faculty find to do so? It is suggested there is only one justification that is really sound: it is determining the relevance or the relationship between law and social need.

The two questions are therefore circular. So this is the question which I address to the panel: Is there any hope that some kind of methodology could be developed to assess what relevant social needs are? Secondly, what is the proper attitude that a faculty should adopt in respect of students demands, especially considering that students are more and more sensitive to bread and butter issues, and are basically conditioned by Bar examination requirements?

Dean Charles: I will try to find someone to answer those questions for you Fabien. Hudson, I thought I saw you indicating that you wanted to say something.

Professor Janisch: I doubt very much, Mr. Chairman, if I am to going to answer the questions. I would like to address them because because I think they are very profound. It seems to me that we have to admit right from the outset that we do not have any scientific methodology up our sleeves that is going to be able to predict the need of lawyers, and indeed the need of lawyers in various particular branches of practice. Certainly, Québec provided the most dramatic example when large number of trial lawyers found themselves unemployed after the government made the decision to go over to no-fault automobile insurance. There is some way to go before the legal profession can provide a comprehensive scientific methodology of social needs.

PROFESSIONAL COMPETENCE AND THE LAW

Fourth Session: Friday, May 29, 1981

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Are Judges Competent?

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Peter Cook, as E.L. Wisty, begins a well known monologue on a legal theme with the following:

> I'd like to have been a judge, but I never 'ad the latin. I never 'ad sufficient latin to get through the rigorous judgin' exams. They're very rigorous--the judgin' exams--they're noted for their rigor. People come staggerin' out saying, "Oh my God, what a rigorous exam". So I became a miner instead, a coal miner. They're not so rigorous--the mining exams, they only ask you one question, they say, "Who are you?" I got seventy-five per cent on that.[1]

I will return to the topic of rigour shortly.

It is trite to dwell on the critical, pivotal role played by judges in common law systems. The function of the judge in the Common Law is clearly very special.[2] It is well to remember that the great judges of the common law have been law-making judges, judges with the foresight to adopt the laws to changing societal needs and to look to society's future needs.[3] It is not enough to say that the great judges like Mansfield, Marshall, Story and Holmes lived in rapidly changing times which required creative judges making and forming the law. Many great judges, perhaps Cardozo and Denning are two good examples, did not live in such rapidly changing times. Also there were many other judges, in those rapidly changing times in which Mansfield, Marshall, Story and Holmes lived, now forgotten having played little or no role in the development of the law.

Cases decided by great judges are great because of what the judges make of them.[4] All cases can be decided in a narrow technical way--great judges do more than that. It must be fair to say, however, that circumstances are sometimes more conducive to making a judge great. Changes in society which the legislature has not effectively mirrored in the law and appropriate pieces of litigation provide foundations upon which great judges can build.

My first point is that the great common law judges have been builders--law-makers.[5]

Qualities of Judges

To turn very briefly to the sort of qualities we can expect of our judges: although perhaps not of enormous use the qualities can be listed, as a recent American survey of English judges indicates:[6]

> Impartiality,
> Incorruptibility,
> Patience,
> Courtesy,
> Understanding of human nature,
> Willingness to hear both sides with an open mind,

Ability to discount one's own prejudices and to maintain a detached and balanced attitude,
Mental power and dedication to think about, understand and decide all issues,
A sense of where justice lies in a case.

Presumably implied in all this is an ability in the law--in the procedural and substantive matters which come before the judge.

Possessing these qualities might be enough to be a competent judge as far as the issues between the parties are concerned. But the wider responsibility to the law, and to citizens who are entitled to know what the law is, requires something more.

The Times, in June 1975, entitled a lead article "Thank God for Lord Denning."[7] While there would be enormous differences of opinion were one to ask lawyers in traditional common law jurisdictions who is the most important judge of the twentieth century I would have no difficulty in recognising Lord Denning as that judge.[8] Perhaps it is because he is a law professor's judge. But it is really because he not only believed that appeal judges make law but he believed they should make law. Certainty in the law he delegated to a secondary function.

For instance, Lord Denning said:

> The truth is that the law is uncertain. It does not cover all the situations that may arise. Time and again practitioners and judges are faced with new situations, where decisions may go either way. No one can tell what the law is until the courts decide it. The judges do every day make law, though it is almost heresy to say so. If the truth is recognized then we may hope to escape from the dead hand of the past and consciously mould new principles to meet the needs of the present. ...[9]

and one might add 'and of the future.' He also said "... if the law is to develop and not stagnate the [courts] must, I think, recapture this vital principle--the principle of growth."[10]

My second point is that in addition to all of the established abilities required of a good judge a great judge must possess a crusading spirit. The possibility of being overturned should not be feared or dampen this spirit--after all the overruled judge may still be right!! While less adventurous judges might be affected by the possibility of being overruled, surely Mr. Justice McCardie represents an extreme. He was quoted as saying in deciding one case: "If there be an appeal, I shall not supply my copy of my notes until I am satisfied that Lord Justice Scrutton will not be a member of the Court which tries the appeal!"[11] Let me say a few things about how I see judicial law-making--judicial activism interfacing with competence--and then I will return briefly to rigour.

Judicial Activism

With the ever increasing volume of legislation emanating from our legislatures the tendency has been to conclude that legislatures have the responsibility for law reform and thus to suggest a reduction in the role of the judiciary in this area.[12] Much of the elevation of legislatures to the role of law reformer came at a time when governments were actively involved in law reform. With some exceptions this is no longer the case and governments have turned largely to other things. In this Province, for example, Property, Commercial and Corporate Law are all sadly out of date. If legislatures are not going to actively reform the law the judges must. Even if the legislatures do actively pursue law reform they cannot or will not do everything. Lord Denning, for example, set about reforming the law of contract whenever an opportunity arose even though law reform at the legislative level continued in other areas.

There are some (perhaps an increasing number of) areas of the law to which legislatures are unattracted and, of course, some to which they have just not turned their minds. Even Lord Devlin has urged judges to reform the law in these areas where a case arises in which justice requires the law to be changed.[13] Chief Justice Laskin has made the same plea.[14] The law should clearly reflect societal norms and standards and when these change, judges should ensure that the law changes too.

My third point is that, no matter what, there will be instances in which judges should feel compelled to reform the law--to really make law. Judges are different and will vary in their tendency to recognise and seize these opportunities. A related, and my fourth point, is that judges should indicate whenever the opportunity arises, both in court and in the public forum, what law reform should be taking place. Judges frequently make public pronouncements and they should draw attention to deficiencies in the law and suggest solutions. This, judges do not attempt frequently enough.[15]

The Benefits and Detriments of Judicial Activism

Just as judicial law-making can change the law for the good it also has the potential to make matters worse.[16] Good and bad and such similar phrases are, of course, predicated on value judgements. The liberal who argues for more judicial activism must accept that it can backfire and in the hands of a conservative judge can bring about undesired results. The same applies to the conservative. It has been an interesting phenomenon in the United States to see liberals and conservatives argue for or against judicial activism depending on the prevailing attitudes of the judges, and one reads now of Lord Denning's more conservative side, and the fear that he could undo much of what he has already done.[17]

My fifth point is a rather personal one, that in spite of the risks judicial activism is valuable--that the benefits will outweigh the detriments. This is perhaps predicated on a sound basis--the judicial activists in traditional common law jurisdictions have, on the whole, been a liberalising influence. We are in a period of rapid technological change and one in which, as mentioned, legislatures are less concerned about pure law reform--the law is, therefore, in need of activist judges.

Judicial Activism Is Democratic

Those, such as Lord Devlin, who argue against judicial activisim tend to argue that law-making is the function of legislatures because law-making should be democratically derived. The protection of minority interests, especially unpopular interests, however, has invariably been left to the Courts. Governments frequently feel that they cannot reform the law in particular ways for fear of the political consequences--i.e., they feel that the majority has little sympathy, indeed sometimes outright hostility, towards a particular minority interest. The democratic rights of those minorities must be, and have been, protected by the courts. One has only to look at the strides in civil rights in the United States to see the impact of this. But the same applies to such questions as fairness in contractual dealings and other private law matters. Courts and judges have an important function in a democracy to protect "little people" whom legislatures will not protect. The short-term consideration of politicians frequently are contrary to major needed law reform.

My sixth point, therefore, is that judicial activism is a vital part of democratic law-making.

Judicial Competence and Judicial Activism

My main theme and my seventh point, then, is that judicial competence and judicial activism are entirely intertwined, and that to be competent in the perspective herein stated a judge must be an activist.

Intellectual Rigour

If I may return to rigour for a moment. My biggest general complaint with judicial decisions is that I only rarely learn much from them. To generalise, judgements in Canada at present, tend to present the facts exhaustively, mention what some of the precedents and authors have said about the topics at issue and conclude with perfunctory legal reasoning. To my mind the cut and thrust of debate and discussion has generally given way to cutting and pasting of the views of others. It is always a treat to find a concise, articulate, analytical, well-written and imaginative judgement.

There are a number of reasons why in Canada, as elsewhere, we do not always appoint the best judges. It is clear to be a competent judge requires an intellectual ability of a very high degree together with a wealth of knowledge not just of legal principles but of legal history, legal philosophy and other legal systems. These are qualities which great judges possess and which in order to competently perform the judicial responsibility to the Law, judges must possess. These four qualities, intellect, and knowledge of history, philosophy and comparative legal approaches, would tend towards a rigorous analysis of the problems faced by a judge. In addition, it must be clear nowadays that an appreciation of the economic, political, and the social sciences is of considerable assistance to an exhaustive examination of issues.

Clearly the qualities required of a competent judge are of no small order.[18] There have been many judges who have been great and still more who have been competent to play the pivotal role the common law assigns them; but it still remains that the qualities required of a competent judge within the perspective discussed is likely to make their number small.

Conclusion

In the same monologue with which I began E.L. Wisty concludes:

> The trouble with being a miner is that as soon as you're too old and tired and ill and sick and stupid to do your job properly you have to go. Well, the very opposite applies with the judges.[18]

While this statement cannot be justified, nevertheless, there is much in our judges and their judging that should cause concern. The spirit and heritage of the Common Law places upon the judge an almost impossible pivotal role in the development and formulation of the law and yet many have made an effective contribution. So many more, however, have fallen short of the standards required. So often we have not had the leadership in legal thought we can reasonably expect from the Supreme Court of Canada and very little of jurisprudential value emanates from the lower courts. There are concerns expressed in the U.K. and the U.S. about the quality of judging and indeed the vast majority of states have procedures for judging judges.[19] While a critic of judges cannot expect a friendly welcome nevertheless the time is long overdue for a thorough consideration of the training, appointment, procedures and workload of judges in an attempt to improve the quality of our judicial process. For without a dynamic, far-sighted and resourceful bench, the likelihood of the law keeping in step with the times appears remote. The challenges are considerable but they must be met. Society and the law demand it and rightly so.

FOOTNOTES

1. Polydor Records, The Mermaid Frolics, London.

2. See e.g., B. Schwartz, The Judicial Ten: America's Greatest Judges, So. Ill. Univ. L. J. 405 at 406 [1979]; A.M. Gleeson, Q.C., Judging the Judges, 53 Aust. L. J. 338 at 338, (1979); 3 Auckland U. L. Rev. 442, at 444-7 (1979).

3. See B. Schwartz, supra note 2.

4. Id., at 409.

5. There is, however, a distinction to be drawn between great and competent. I would argue that this is not a difference in type--merely a difference in degree.

6. D.J. Meador, English Appellate Judges From an American Perspective, 66 Geo. L. J. 1349, at 1385 (1978); see also Lord Devlin, Judges and Lawmakers, 39 Mod. L. Rev. 1 (1976); Robert Stevens, Judicial Legislation And the Law Lords: Four Interpretations, Irish Jurist 1 and 216 [1975]; A.M. Gleeson, supra note 2 at 340.

7. The Times, 28th June, 1975, at 13.

8. C.M. Schmitthoff, Lord Denning and the Contemporary Scene, 6 Man. L. J. 11 (1975); C.M. Schmitthoff, Lord Denning and the Contemporary Scene, J. Bus. L. 97. [1979] cf; D. Williams, The English are Best, 8 U. V. W. L. Rev. 358 (1977).

9. The Reform of Equity, in Law Reform, 1953 at 31, quoted in Robert Stevens, supra note 6 at 239.

10. From Precedent to Precedent, Oxford, 1959 at 31-2.

11. Quoted by S. Shetnect, Judges on Trial, North-Holland Publishing Co., Amsterdam, 1976 at 172.

12. See the opinions of Lord Reid, supra note 6, and Laskin C.J.C., A Judge and His Constituencies, 7 Man. L. J. 1 (1976).

13. Supra note 6.

14. Supra note 13 at 14.

15. See A.M. Gleeson, supra note 2 at 346. Frequently little attention seems to be paid to judges' opinions of what the law should be.

16. See Lord Reid, supra note 6 at 7.

17. See D. Williams, _supra_ note 8.

18. See Barbara Fenoglis, _Citizens Size Up Their Judges_, 59 Judicature, 472 at 477 (1975-76), where the writer discusses the high expectations society has of its judges.

19. _Supra_ note 1.

20. See Frank Greenberg, _The Task of Judging the Judges_, 59 Judicature, 458 (1976).

21. See A.M. Gleeson, _supra_, note 2 at 344.

DISCUSSION

Mr. Chief Justice Cowan: At the trial level, that is one of the things that deters us. That is, we have litigants in front of us. Now I may find that the law applicable is not a law that appeals to me. Am I going to say "This is the law. I have to apply it."? Or am I going to say "This something else ought to be the law." And immediately there is an appeal. And our appeal court is going to say "You did not follow the law" and will assess costs accordingly. That is the risk you take. Now they may go on to the Supreme Court of Canada. At that level, maybe, they can do something, but at the trial level, we have a natural reluctance to involve people in that type of litigation when the chances of success on appeal are normally very limited.

Mr. Justice McIntyre: It is all right if the judge does not give reasons. But I think that is a real problem for a trial judge and it is, of course, for an appellant court judge in the province. And that is one of the things that deters us from trying to change the law. I think that it is a real problem. The 'rule' might very well be something that the judge prefers not to apply. But I think most trial judges feel that they are not in a position to change it.

Professor Axworthy: Of course, sometimes it is also a nice cushion if you know that the Court of Appeal is there to exercise judgement in the event that what you do in the court below does not turn out to be acceptable after the fact. But I appreciate that it is really a very difficult problem for a trial judge.

Comment: Very true. I had an example, recently on a question of sentencing, and the totality of sentencing. I did what I thought I should do and then said 'Look, you better go to the appeal court." The man had been convicted and sentenced to five years. This was under appeal. He had plead guilty to about six other offences. I had to consider totality. So what I did was to consider them all, but without regard to the sentence which was under appeal. I said, "I suggest you take that to the Court of Appeal." Now I feel that that was the right thing to do. But if I were making a final decision, or involving people in more civil litigation, where costs are involved, then I would have had to be more careful and, therefore, reluctant to go out on a limb and say what I think is right.

Professor Axworthy: And that is the difference between what is involved between the parties, and what is involved with the law in more general fashion.

Mr. Justice O Hearn: I think that the trial judge has an obligation to try to depend on something that is going to stick.

Professor Axworthy: I remember that interesting quote from Mr. Justice McCardie who perhaps represents the extreme view of this interest in the Court of Appeal, when he said: "If there be an appeal I shall not supply any copy of my notes until I am satisfied the Lord Justice Scrutton will not be a member of the court which tries the case."

One thing about looking at something like this is that it is quite amazing what judges will say about other judges, especially judges who are deceased. Lord Justice MacKinnon once wrote an article about the commercial court in England and said some horrendous things about some judges. Amazing.

Comment: What about judges who misconstrue what other judges say?

Professor Axworthy: That is what Lord Denning does all the time. He says "Remember that case that was decided in the Court of Appeal not long ago; well in that case the following was decided." He draws on his own interpretation of that case, or rather his own misinterpretation of what the law should be, and then uses that as precedent.

Mr. Justice McIntyre: It seems to me that we have to keep this in its proper perspective. Ninety-nine percent of all the cases that come before a judge are routine cases, and they are decided on their own facts. The great cases of the common law that you are referring to are very, very unusual cases. And most of them were not considered very great at their time. It is in retrospect that we see some of these cases as landmarks and maybe there are a few cases today that will assume landmark proportions later on. I agree with what Judge O Hearn has just said, that a trial judge has to try to provide something that will stick; and I think that he means that it will conform with the law or be according to the law. I believe as well, however, that a judge is a human being and that, at any level of the process, the case will arise in which his conscience tells him that he has to say something, maybe go beyond the law, and that he has to make a declaration to that effect. That would be a very rare occasion indeed. It has its dangers ...

Chief Justice Cowan: I believe that Mr. Diefenbaker did the right thing when he cut judges back to a seventy-five retirement age--judges who could have gone on for life. Many people resisted that. They thought that it was unconstitutional and could not be done and that it was wrong. I think even seventy-five is too late.

Madame Justice Glube: On the other hand I've had a concern with appointment. I was forty-five when I was appointed. Is anybody really going to want to see me stay on until seventy? I think it is wrong for any one person to stay on one bench that long. I do not know whether I will have the sense to retire or not to retire. But many people want to continue because they still have an active mind and want to participate, even though they probably should not continue where they have been on the bench for twenty years or more. I think that, after that length of time, there is a possiblity that a judge is going to become semi-isolated and, unless he or she is very careful, not as conscious of what is going on as he or she was within the first ten or fifteen years of appointment.

Professor Axworthy: Do judges feel isolated?

Mr. Justice McIntyre: Professor, you made another very interesting comment. You said that you have not learned too much from reading judgments. That is a very fair comment. I think that that is a fair criticism of most of the judgments written in common law jurisdictions and probably with particular emphasis in Canada, in, let us say, the mid-third of this century. I think that we have to do something about it. But what else should we do? Surely there must be some other defect on the Canadian bench than just the fact that you want finer judgements.

Professor Axworthy: Well, the other criticism is that I do not think that there is enough judicial lawmaking.

Mr. Justice McIntyre: Well, alright, we have that one down too, but surely there must be something else.

Professor Axworthy: I think that those are the only things that, as a law teacher, I look for in a judge. Of course, there is the problem of fair decision-making and I do not have any real difficulty with that. But the things that I look for as a law teacher are cases I can use, cases I can talk about, and analyze, and get something from. And that means not only intellectually rigourous in the analysis of cases, but cases which say something that no other cases say.

Mr. Justice McIntyre: So what you are getting down to then as a basic criticism is that we are not sufficiently active.

Professor Axworthy: Those are the only criticism that I really have to make apart from attaining fairness between the parties. In terms of approach to the law, those two things make or break the judicial process.

Mr. Justice O Hearn: Activism does not strike me as being too much of a criticism. In the ordinary case a judge who makes law does so by filling in the gaps which the legislature has not covered explicitly. The thing that gets me is the criticism that I got from John Willis the other day, that Canadian Bars are unscholarly. I think that is a fairly just criticism as it applies to our judiciary also. Judges have not done enough comparative exploration in other systems and in the general concepts of law, in jurisprudence and things like that, to really be able to look at all the angles in a case. That is where the law school can perform a very practical task, not only with the students, but also by providing this kind of background for lawyers generally. You need to expand the mind, you need to be more catholic in your approach to human nature.

Professor Axworthy: Would it be easier to be an activist judge if the Bar was better?

Mr. Justice O Hearn: I'm not an activist judge. I am a very conservative judge. I have on occasion done some things in order to do justice in the case. But it is not really the function of the judiciary to bring the law continually up to date. We can occasionally do that with procedures and evidence, and things of that nature...

Mr. Justice McIntyre: One of the problems that I see with this concept of judicial activism is the reaction that it is sometimes prone to produce. We had some very bad examples in the last few years. Hasty, pressure-group amendments made particularly to the criminal code, in response to what was considered to be judicial activism. The law has actually been set back simply because of such so-called activism. I do not know exactly what you mean by judicial activism but Edwin F. Commerfon of the Wall Street Journal had this to say in 1968:

> No matter what euphemisms are employed to disguise its effects, careful reflection must lead to only one conclusion. Judical activism is not merely inconsistent with the rule of law, it is the total negation of the rule of law. If cases are decided on the personal philosophies of judges, then in reality there is no law. If the Constitution has no objective meaning, if it means only what judges think it ought to mean, it is not a constitution at all but an empty symbol.

I may want to activate the law in one direction. And my Irish colleague here might want to take the other direction. And if it happens to be your day in court what happens?

Let me say one more thing about Lord Denning. If you are to apply strictly his famous Hedley Byrne comments, one of your law students is going to have the chance to sue you for misrepresentation and negligence for misinforming him on a rule of law, when he is stuck with negligence in court!

Professor Axworthy: I am squash player and squash players have to be on the move all the time. I do not think that it always matters which way you start as long as you eventually end up by getting the ball, sometimes by starting on this side and sometimes by moving to that side. I agree with you, from a personal point of view that some active judges who are going to be making the law, are going to be making undesirable law. I am prepared to take the risks of that happening, because other judges aregoing to be making very desirable law.

Mr. Justice McIntyre: But the poor litigant is unfortunately involved in the process. He planned his affairs under the law. He planned a great scheme which involved his whole estate, all his assets and the welfare of his children, in accordance with the existing law. Then somebody activates it and he is out a lot of money.

Professor Axworthy: Well yes. If I could choose another example, in say, contract law. People tend to enter into contracts without thinking about what the law is. Most contracts are oral; basically they are informal arrangements. The law does not really enter into their minds. In those circumstances, it is much more appropriate to justify activism as being in their interests, not the contrary.

Mr. Chief Justice Cowan: I agree with what Mr. Justice McIntyre says. We believe in the rule of law that there is no certainty where there is no law. I believe also in doing what is right in the circumstances. But the complaint I get from judges is that they do not get time for mature consideration and for polishing their judgements and so on. The main thing is for them to decide upon the issues before them and then go on to another case. If they reserve judgement, it takes ten times as long to do the reserve judgment as to deliver it formally at the conclusion of the case. My own feeling is that they should reserve decisions for the few cases that raise very real problems of significance: constitutionally, or of general interest across the country. With the case volume they have and the number of cases that are on reserve, I do not see how they can do otherwise Take the United States, they only have nine men and they have they thousands and thousands of applications. So they rank them, they pick and choose what they will hear. I am glad to say that that is not the way we operate. As somebody said of Cardozo on the Amerian Supreme Court, he selected the cases in which he wanted to make the right kind of decision he felt he wanted to deliver.

Comment: I had a comment earlier about the quality of judgement and I think it has been pretty well canvassed. I do not want this to sound overly defensive; but in a lot of cases, especially in the trial division, the quality of the judgments may be reflective of the quality of the briefs and the argument that are presented to us by counsel at trial. We do not have the independent resource facilities, the time or research facilities to do the preliminary work ourselves. Therefore we go on what is before us. And, if it is not great, then, I suppose, it's garbage in, garbage out.

Madame Justice Glube: One wonders too if there is a lot more publishing today of cases than occurred in the past. We have seen cases that never would have been printed before.

Professor Axworthy: I think you are right.

Comment: I think, Mr. Chairman, there is one aspect of law reform that is performed by the judiciary which perhaps we should not lose sight of.Having had a little to do with law reform matters in my own province, I have found that a great deal of co-operation is given by the judiciary to independent private consultations in relation to proposed changes in the law. I am sure that also exists in this province and would in other provinces, quietly but very surely. The input of the judiciary is invariably obtained, and very helpfully obtained. I have never yet been turned down when approaching a member of the judiciary for informed comment on what he or she might think of a law reform proposal. I would strongly suggest that a good deal of law reform is, in fact, obtained in this way. So, I think, it is this manner that the judiciary has a very distinctive contribution to make and it does make it, from A to Z.

Comment: I just wanted to make a comment about the subject of competence generally. I do not know how you define competence. I think the point was made in one of the sessions earlier this morning, that, when you use the word "competence," you really are painting with a very large brush--whether you are talking about law teachers, judges, or lawyers. Each one of those groups has a many-faceted existence. It is difficult to be precise when we talk about competence. I have another problem as well, in the sense that I do not have the same appreciation of the difficulties faced at the trial level as I do at the appeal level, particularly in the Supreme Court of Canada, because I am a law teacher and I spend my life pretty well looking at appeal decisions. My comment is simply this. However you define competence or incompetence, one of the things that I have noticed in my review of the Supreme Court's work in the labour law area (I do the labour law section in the Supreme Court Review) is the recurring number of times that the same issue seems to come up before the Supreme Court of Canada. I have run out of fingers and toes to count the number of times that the scope of review of a labour arbitrator has been before the Supreme Court of Canada. Now if the Supreme Court of Canada was competent, it seems to me that that issue would not be there year after year after year. In other words, there is something either in the way the Court writes its decisions, or in the signs that it gives the profession to appeal or lower courts that is not clear enough, or else that issue would not continue to come before the Supreme Court. However you define competence, this is a concrete example for me of--if not incompetence--at least a lower level of competence than I think I would expect of the final court of appeal.

Mr. Chief Justice Cowan: You raise the question of the desirability of having dissenting judgments in the final court of appeal. Now the Volvo case for me is a prime example of the horrors of having three or four decisions--to a trial judge trying to interpret them in four different directions in a number of different briefs. There is much to be said for a single judgment. This I think would help to clarify the area of confusion. However, there is the other argument, that, if you have a dissent, as you did in Murdoch, many judges feel that they would like to file a dissent in the hope that in a relatively few years, or in many years, that dissent might be accepted as a general rule.

Mr. Justice McIntyre: Let me make a comment upon a criticism before us. It is a fair criticism. We are at fault in that respect. And I think that it may well be that we have not quite mastered our right to refuse to hear. We have not actually used it strenuously enough. We should have combed out many of those cases. Another problem that arises, and I do not want it to be thought that I am talking out of school, because this is a matter that has been discussed in American and in English circles, is the question of whether a dissent, once having been categorized as a dissent, a judgment should be or can be restated. I think that the tradition, of course, in the House of Lords, is that, if there is one dissent the next time the point arises the dissenting judge will follow the majority. That has not been the American tradition and our own situation is in flux. This, I think, has contributed to many of these reported cases on the same point. But there is no doubt whatever in my mind that we ought to tidy up our act.

Mr. Justice O Hearn: A good many of those cases on labour arbitration may have have been avoided if the courts had refused to hear them.

Professor Axworthy: Is there a concern for the activities of judges, or rather a more basic concern about the way in which judges are appointed?

Comment: I came across a federal judge in the United States who was an attorney general under Carter. He said: "It is very easy to become a federal court judge. For me I ran two of John F. Kennedy's campaigns in Georgia and two of my best friends in the Senate were from Georgia. And it helps to be a good lawyer as well."

Comment: Leaving the cynic's position aside I wonder the fact that one is very successful as a practicing lawyer necessarily means that you also are going to be a very, very good judge. I do not think so at all. I think that again--I think the point was made in one of the sessions earlier this morning--that there are a package of skills that are associated with each aspect of this profession of ours. And the fact that one is an excellent advocate--whether trial level or the appeal level--does not necessarily mean that you are going to be an excellent judge once you get to the bench in crafting your opinions and doing the job the judges have to do. I do not know whether they have aptitute tests which can be put together for judges to take, or for potential judges to take. If you look at some of the European systems, you are trained as a judge from the earliest years and you write exams in judging as well as in lawyering.

Professor Axworthy: Even in the English system this exists to a degree. It is not really recognized, but there is a definite promotional hierarchy. You go from barrister to silk--which you apply for and sometimes obtain. Then from those silk, recorders are chosen and various lower echelon judicial appointees--some full- and other part-time. Promotion is then to the High Court and then from the High Court most appeal court judges are chosen, and finally, the Highest court judges are chosen from the appeal court judges. So even in the common law there is a tradition of training for the judiciary which is perhaps not always recognized. Sometimes persons like Lord Reid and Lord Cross are promoted straight to the House of Lord or sometimes to the Court of Appeal, but not very often.

Mr. Chief Justice Cowan: The English judiciary have one advantage. They choose from the bar, from people who are trained either in the art of advocacy or in the art of preparing, reading, researching and presenting the law. That is one area of training which I think is a good basis for work as a judge. My own experience is the system has worked remarkably well, in spite of the defects. Certainly in the trial court I found that people who come out of a busy office practice, even if they have never had any criminal law experience, adapt more easily than people coming from criminal law practice, either in prosecution or defence. Criminal practice tends to be a very segmented kind of work. Such lawyers are not at home dealing with civil matters, civil juries or trials, including chambers matters and things like that. My observation is a person can be very good in a criminal law,without being terribly well organized. It is a one-shot deal. Criminal lawyers spend all their time on one case; much of it is thinking on their feet, and presenting their version of the facts because at bottom, the law is relatively certain. That is my observation.

Comment: If we make a comparison, a general comparison, I think that our judges will stack up pretty well against the judges of any country. So I do not have any particular complaint about how judges get to be judges in Canada. But I am concerned about the tremendous load that must be borne by our judges. Even if our whole bench were filled, there is too much work for our judges to handle. I know some of our judges in New Brunswick are going to work at seven o'clock in the morning and they are going back in the evening. One of our judges, last year, started having night hearings. All that did was cater to the lawyers who were pretty busy and wanted their cases on all the time. Our judges work very hard to keep up with the pressure of work. That may give the impression of incompetence when judges put judgements on a rush. They are going to appeal the worst decisions to the Supreme Court. So it is not the method of judicial appointment that I question; it is the lack of appointments, and the lack of sufficient appointments, which I think is the real problem with the Canadian judiciary.

Professor Axworthy: It seems to me that lawyers no longer see the pinnacle of their career as being judges. That is not the goal that they strive towards. Is this true?

Comment: I think that it is true.

Professor Axworthy: So lawyers do not start off on the trail to the Supreme Court of Canada. They start off on the trail towards having a successful practice.

Mr. Justice McIntyre: I think that the problem of competence is complicated by financial difficulties. You can provide a remedy more cheaply, more efficiently, and more quickly by way of arbitration. Talking about competence, unless we tidy up the whole problem of efficiency in the judiciary, unless we get the costs down and get the process to run more efficiently, we will face very real problems.

Mr. Justice O Hearn: I had an experience with the "no fault" system in Quebec. I had an accident with my car the day I arrived there. A lady ran into my rear. Solving things through arbitration was absolutely simple, beautiful, and did away with all the hasslings and arguments. And as a chap in Montreal said, "The lawyers have just been wiped out of the picture there.

Mr. Chief Justice Cowan: In California, they have set up panels of lawyers who attempt to arbitrate and bring people together. And they have had great success at it. That is the only way they ever begin to overcome the backlog. It is much cheaper and quicker, and that is what people want. They want cases decided one way or the other.

Professor Axworthy: Would you be prepared to get rid of fault as the whole notion of civil liability, as has occurred in New Zealand?

Mr. Justice McIntyre: I think that is going to come...I observe a shrinking in the traditional jurisdiction of courts; expanding on a few fronts, but generally shrinking.

Mr. Chief Justice Cowan: I think that judges will not be opposed to seeing certain areas of their jurisdiction removed. Some would, resist, for instance in criminal matters. Some judges are against doing so in principle. I do not know particularly why. As far as I am concerned, if a provincial court can deal with the matter more efficiently than the supreme court, I would have no objection at all. Now there is also the question whether you want to retain the jury. Traditionally that has been reserved for the Supreme Court or for county court judges, sitting with juries. They do not in this province, but they do in B.C., Ontario.

Mr. Chief Justice Cowan: They do in Ontario.

Comment: Our Minister of Justice in New Brunswick said over a year ago that it was then his intention to have a unified criminal court which would hear all types of criminal proceedings, from preliminary inquiries to jury trials, in the same court.

Mr. Chief Justice Cowan: I have no objections if some other court took over such areas as family law. Matters should be dealt with in the court which has the proper support and facilitee to follow up and do investigations, which we do not have in the Supreme Court. But some judges will say that the family courts should not decide questions of property; only custody and maintenance issues. Different courts will deal with different issues.

Professor Axworthy: If we are going to have specialization among lawyers to provide for the complications of society as a whole, we also need specialization in the judiciary. We cannot avoid such an inevitability.

PROFESSIONAL COMPETENCE AND THE LAW

Fourth Session: Friday, May 29, 1981

SEMINAR 2

Speaker Page

Are Practitioners Competent?

MR. R. PUGSLEY, Q.C.
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R.N. PUGSLEY, Q.C.
STEWART MACKEEN AND COVERT

The field of civil litigation in the Province of Nova Scotia exploded in the last ten years.

Consider the following:

1. In the year 1980 there were 4325 Origninating Notices (actions) filed in Halifax alone in the Supreme Court Trial Division. There were 3920 filed in the County Court and 1164 Divorce Petitions filed. Supreme Court Judges at Halifax handled 2209 Chambers Applications and County Court Judges dealt with 815 cases. The Supreme Court handled 152 criminal cases and the County court dealt with 558 cases.

2. Of a sample of 123 unreported Decisions of cases tried in Halifax that we have on file in our Law Library, 47 involved money arising out of personal injury claims, division of matrimonial property, assessments, etc. 15 of these Decisions dealt with sums in excess of $50,000.00 and 8 dealt with sums in excess of $100,000.

The June 1980 amendment to the Judicature Act permitting interest on awards has significantly increased the size of awards.

3. Cases involving large sums of money almost invariably require extensive pre-trial work, the use of experts, which leads to significant trial costs. While our Costs and Fees Acts is long overdue for revision, the judges are alleviating some of the problem by permitting successful parties to receive enhanced costs on taxation.

It is interesting to note the change in the approach of the Judges to the problem. For example in *Gallant* v. *Walker* (1974), 15 N.S.R. (2d) 264, Mr. Justice Dubinsky fixed a gross sum of $850.00 as costs in addition to taxed costs.

In *Harris* v. *Minister of Lands and Forest* (1975), 11 N.S.R. (2d) 360, Chief Justice MacKeigan, on behalf of the Appeal Division, disallowed a gross sum of $25000.00 but in lieu of the gross sum allowed an increased council fee of $200.00 per day.

In *Wadsworth* v. *MacDonald* (1976), 16 N.S.R. (2d) 592, Chief Justice MacKeigan quashed a gross award of $7500.00 and increased council fee to $1000.00 per day for leading counsel and $400.00 for associate council. His Lordship stated:

> Counsel fees, gross sums, or any other items of party and party costs must be controlled, I suggest, solely by the amount and quality of the legal work performed, having regard to the nature of the case.

In *Lunnon and Lunnon* v. *Reagh and Reagh* (1978), 25 N.S.R. (2d) 196, Mr. Justice Cooper on behalf of the Appeal Division awarded an increased counsel fee of $1000.00 a day for leading council and $400.00 a day for associate counsel.

The same practice was followed by Chief Justice Cowan in Lock and Sons Limited v. Wedgeport Marine, a decision filed on May 22, 1980.

In Clayton Developments Limited v. The Nova Scotia Housing Commission, a decision filed on December 3, 1980, the Chief Justice awarded an increased counsel fee of $1500.00 a day for leading counsel and $750.00 a day for associate counsel in a case that lasted 15 days. Counsel fees will presumably aggregate approximately $45,000.

4. In the ten month period ending May 1, 1981, 94 potential claims for professional negligence have been filed against the members of the Society.

   The claims break down as follows:

   (a) 58 arising out of property problems, essentially poor title searches.
   (b) 7 Mechanics liens actions filed out of time.
   (c) 5 limitation periods missed. (3 automobile and 2 fire).
   (d) 10 claims alleging poor legal advice.
   (e) The balance arose out of miscellaneous areas of practice.

I have been asked by the conference organizers to speak to you for approximately 15 minutes and then invite discussion from the floor on the topic "Are Practitioners Competent?"

My discussion will be limited to the problems that arise in the conduct of civil litigation. I will not deal with the practice of criminal law, or the conduct of a solicitors practice--two areas in which, I am, happy to say, blissfully ignorant.

The answer to the question "Are Practitioners Competent?" is surely this--sometimes yes and sometimes no. I thought we might usefully spend the time by investigating those areas in which I feel we can all improve our performance.

Preparation is, of course, all-important, as far as the conduct of any trial is concerned. The day is long since past when one could pick up a file the night before the trial and to have a reasonable chance of success the following morning.

I suppose it goes without saying that preparation, no matter how thorough, may not be sufficient in some cases if you have had no experience in the particular field. The complexity of litigation may require you to seek guidance of more senior counsel. The areas that receive the least attention seem to me to be as follows:

1. The handling of documents. A mastery of documents is an area where most of us fall short. It is essential that you obtain a disclosure of documents from the other side before you proceed to oral discovery. After receipt of the documents you should go over them in detail with

your client, and in the course of preparation for oral discovery of the other side, have available those documents that you wish to introduce during the course of the discovery process. People's recollections can change; people's impressions can change; but documents are documents, and if there is a part of a document that is damaging to your position, then your client better have an explanation for it before you expose him to the oral discovery process. Almost any trial today requires the proof of a number of documents. To have them readily available at discovery or trial with appropriate indexes so you can lay your hands on them immediately is an obvious essential. Prior to the time you arrive at the pre-trial conference, have your documents bound in a book, completely indexed, deliver a copy to the other side and to the trial judge so that he will be familiar with the documentary proof that you propose introducing.

Our Civil Procedure Rules are the most liberal of any jursidiction in Canada as far as permitting discovery of the opponent's case. I am sure that it was the intention of the Chief Justice when drafting the rules, that all litigators would have to have a certain level of advance preparation before they came to court. In this way, one might have anticipated that there would be a certain levelling out of the ability of trial lawyers because of the facility that the rules give to each party to obtain disclosure of the other side. While this may be true in some cases, certainly to the extent that I am sure everyone uses oral discovery before they proceed to trial, the rules yield a great advantage to the practitioner who knows them, and who uses them in support of the development of the proof of his case, and to obtain disclosure of his opponents case.

2. Surprisingly enough a fair number of solicitors do not realistically evaluate their cases before they proceed to trial. A realistic evaluation obviously serves many purposes:

    (a) It requires you to be fully prepared before you go to trial.
    (b) It enables you to give an opinion to your client as to what his chances at trial will be.
    (c) It enables you to put some pressure on the other side, as far as settlement is concerned. In every case, settlement possibilities should be explored in a realistic manner, whether you are acting for the plaintiff or the defendant. This is particularly desirable or necessary when clients will be confronted with the kind of costs that I have described in unsuccessful litigation.

3. Proper preparation of medical evidence is an area that I think is neglected. The appropriate use of demonstrative evidence is an essential tool of the good trial lawyer. Melvin Belli's book Ready for the Plaintiff which was published 20 years ago, is still helpful to those of us who have not had great exposure to this area of practice. The Canadian experience really stems from Martin Wunder's use of video tape in Teno v. Arnold (1975), 7 O.R. (2d) 276.

You will recall that Mr. Justice Keith said in that case at 297.

> As trial judge, I was afforded the utmost opportunity to see the dreadful extent of such disabilities in our daily life and in this connection, I would be remiss if I failed to acknowledge the assistance that I received from her counsel in the presentation of the evidence in a most imaginative, and I believe unique, way in trials today in Canada. Arrangements had been made by counsel to have the technical crew of a local television station in Windsor attend at the Teno home in August 1973 and record on video tape with track about one and half hours of Diane's daily life with her mother and brothers and sister. This evidence was introduced after a proper foundation had been made as to the technical aspects of the equipment, by use of closed circuit television, with commentary from time to time of doctors who were familiar with the child. I cannot conceive of a more graphic portrayal of what I must try to express in words.

Several months before the trial date I find it convenient to break down my preparation into four separate areas:

1. The theory of my client's case.
2. What facts have to be established to support the theory.
3. The manner of proving the facts.
4. The manner of presentation of the facts.

After you have had your initial interview with your client and examined the material that he has available for you, and completed whatever preliminary briefing of the law is required, you should work out a theory as to how, in the case of a negligence action, for example, your client suffered damage consistent with negligent acts on the part of the proposed defendant. The theory should be the guideline for adducing evidence. The evidence should be consistent with the theory and be directed towards the explanation of the theory.

Once you have developed a theory the next step is to develop in point from the facts that are necessary to prove in court to support the theory.

Once having decided on the facts that you must establish, the next question is--how do you prove those facts? They may be proved in the following ways:

1. By securing admissions from the other side.
2. By obtaining answers from interrogatories.
3. By the introduction of oral discovery evidence.
4. By the introduction of documents.
5. By viva voce evidence from your own client, and supporting witnesses, and in some cases where necessary, viva voce evidence from the opposite party.

Finally, it is important to present the facts through the witnesses in the most advantageous manner to make it interesting to the Court--and this is where demonstrative evidence comes into play.

Along with the increase in the amount of litigation over the last decade has been an increase in the use of experts. Since the decision in the trilogy in 1978, the role of the economist or actuary has been very prominent. Even in a relatively simple personal injury case, there are a host of economic issues that have to be addressed--economic issues on which the actuary should give evidence. For example, what is the appropriate deduction for contingencies when attempting to evaluate a future income loss? Mr. Justice Dickson in Lewis v. Todd and McClure (Judgment pronounced on October 28, 1980), stated:

> In principle, there is no reason why a court should not recognize and give effect to those contingencies, good or bad, which may reasonably be foreseen. This is not to say that the courts are justified in imposing an automatic contingency deduction. Not all contingencies are adverse. The Court must attempt to evaluate the probability of the occurrence of the stated contingency. It is here that actuarial evidence may be helpful ..."

What is the result of the incompetence of a lawyer during the conduct of litigation? In favour of granting barristers immunity, there are two decisions of the English House of Lords (Rondell v. Worsely (1967), 3 All E.R. 993 and Seif Ali v. Mitchell (1978), 3 All E.R. 1033). There is also obiter dicta of the Ontario Court of Appeal in Banks v. Reid (1978) 4 C.C.L.T. 2 which would support this contention.

Rondell v. Worsley was concerned with the position of a barrister acting for a client in a criminal case in which the former was engaged on a "Dock Brief", upon being selected by the latter in connection with a wounding charge. The action by the client was for "damages for professional negligence" with respect to his counsel's conduct of his defence in failing to adduce certain evidence and cross-examine certain witnesses. The House of Lords dismissed the action on various grounds, the prime one being that public policy requires immunity of the barrister.

In Seif Ali, the House of Lords (in a three-two split) reversed the decision of the Court of Appeal and held that the immunity of the barrister did not extend to the barrister's pre-trial performance of his duties connected with a civil action for damages arising out of an automobile accident.

In favour of denying barristers immunity there is the recent Ontario case of Demarco v. Ungaro (1979), 21 O.R. (2d) 673.

The negligence complained of was that the defendant failed to adequately counsel or assist or confer with the Plaintiff in preparation for examination for discovery; or that at the trial, he failed to proceed expeditiously with the action, failed to lead evidence which he knew was available and which would have supported the plaintiff's position and sent a totally unprepared junior to conduct the case.

Mr. Justice Krever noted "that until the instant case, this re-examination has not dealt with the lawyers conduct of the client's case in the court room."

In concluding that there was no such immunity, Mr. Justice Krever stated at 693:

> Many of the sociological facts that are related to public policy in the public interest may be judicially noted. The population of Ontario is approximately 8 ½ million people. In 1978 there were approximately 12,300 lawyers licensed by the Law Society of Upper Canada to practice law in Ontario. All of them have a right of audience in any court in Ontario as well as in the Federal Court of Canada and the Supreme Court of Canada. The vast majority of these lawyers are in private practice and as such are required to carry liability insurance in respect of negligence in the conduct of their client's affairs. No distinction is made in this respect between those exclusively engaged in litigation and all other lawyers. The current rate of increase in the size of the profession is approximately 1000 lawyers annually. It is widely recognized that a graduating class of that size places such an enormous strain on the resources of the profession that the articling experience of students at law is extremely variable. Only a small percentage of lawyers newly called to the Bar can be expected to have had the advantage of working with or observing experienced and competent counsel. Yet very many of those recently qualified lawyers will be appearing in court on behalf of clients. To deprive these clients of recourse if their cases are negligently dealt with, will not, to most residents of this province, appear to be consistent with the public interest.

Mr. Justice Krever also noted that in the United States the Courts have not granted immunity to an attorney in the conduct of litigation: "an attorney must exercise reasonable care, skill and knowledge in the conduct of litigation ... and must be properly dilligent in the prosecution of a case."

Mr. Justice Krever did however add this caveat:

> Indeed, I find it difficult to believe the decision made by a lawyer in the conduct of a case will be held to be negligence as opposed to a mere error of judgment. But there may be cases in which the error is so egregious that a court will conclude that it is negligence.

This last passage is reminiscent of Lord Wilberforce's remarks in the Seif Ali case where he stated:

> Much if not most of a barrister's work involves exercise of judgment; it is in the realm of art, not of science. Indeed, the solicitor normally goes to counsel precisely at the point where, as between possible courses, a choice can only be made on the basis of a judgment, which is fallible and may turn out to be wrong, thus in the nature of things, an action against a barrister who acts honestly and carefully is very unlikely to succeed. But this is not an argument for giving him total immunity from proceedings.

The comments of Judge Morrissey, a County Court judge in Ontario, in Wechsel v. Stuts, on December 19, 1980 (15 C.C.L.T. 132) are of interest:

> The plaintiff in her evidence complained of failure of the defendant to cross-examine the assessors called on behalf of the Assessment Department. She was likewise critical of the defendant for his failure to cross-examine on the documents filed on behalf of the assessment department. A counsel cannot be bound by strict rules as to the manner in which he conducts a trial. The extent of a cross-examination of a witness or indeed whether he should be cross-examined at all must be left to the judgement of counsel. If, in the judgment of counsel a witness cannot be broken down or at least the impact of his testimony reduced, it is sometimes preferable to forego cross-examination. Cross-examination in some instances can result in a strengthening of the evidence by mere repetition. As mentioned earlier, the defendant was an experienced counsel and if in fact he refrained from cross-examining witnesses, it is reasonable to conclude that he had a reason for so refraining.
>
> Counsel of course, are not immune from an action based on negligence in the conduct of a trial or a hearing. This is laid down very clearly in the decision of the Honourable Mr. Justice Krever in Demarco v. Ungaro.

The complexity, the cost, the necessity of calling expert evidence, make the trying of a civil case vastly different from what it was a decade ago. This places increasing responsibility on each of us to ensure that we are well trained to begin with, that we keep abreast of current developments in the law, and what is of equal importance, that we learn how to present, before a Court, factual evidence consistent with the theory we have developed of our client's case.

Whether or not we consider ourselves to be competent is only part of the question. How we are going to continue to be competent in view of the changes that have come about in the Civil Litigation arena is equally as pertinent.

D I S C U S S I O N

Comment: Are there any suggestions as to how one tells whether the practitioners are competent or not, in the absence of some actual findings by a tribunal?

Mr. Pugsley: I suppose there is no way of telling. His client might glean it. The other counsel might know it, but...

Comment: Much of the thinking that is done about incompetence is done by incompetents, of course.

Mr. Pugsley: Of course. No, I don't think there is any way.

Comment: This is probably one of the big problems the profession faces. Most of us want to be competent and want our fellow practitioners to be competent; but we find difficulty in judging ourselves and others. I keep looking for some criteria, a formula if you like. You did not come across anything?

Mr. Pugsley: The only, I think the best formula, is to watch my opposing counsel and see what he does. And I learn a great deal from him.

Comment: You may learn technique, but, if I may say so, we are not talking about what techniques you learn by watching opposing counsel. It is not going to help you a bit in drafting an agreement between two businessmen.

Mr. Pugsley: I think a necessary preparation for trial that each one of us must follow is, think how the other side is going to prepare his case. How would I do it if I had his side to prepare? That is what enables me to prepare my witnesses for the cross-examination that I expect they will get. And if the other side prepares differently than I do, then this is something that I note; it might be of great assistance to me in the future.I do not think you can try a case from a point of view of the plaintiff's side alone. You have to think of what the other side will do--what problems they have to face, and how they are going to meet them.

Comment: With respect, you are satisfying me that you are competent. But I am not so much concerned with trial technique or any other technique in the practice of law. I am wondering, has anybody any idea of what process one can go through in order to assess oneself as to competence in the particular area of practice in which one may find oneself in at any particular time. The Canadian Bar has produced a good self-assessment program for looking at the business aspects of a practice; but I know of nothing that you can turn to for self-assessment in your own particular practice. I mean you can ask yourself "Am I diligent?" but ... there are a lot of other questions to consider.

Mr. Pugsley: You can refer to Martin Wunder's book on how to conduct personal injury litigation. It is a good checklist of what you should be doing. While it is not a third party sitting over your shoulder evaluating what you are doing, nevertheless it does enable you to prepare, I think, very, very adequately. I do not know whether all of you are familiar with Wunder's book, but it is a loose-leaf book that came out about two years ago.I think it costs about twenty-five or fifty dollars and is well worth the cost if you are going to do any personal injury litigation. ...

Comment: Again with respect, you are talking about methodology, technique, in a particular area of practice. You can get all kinds of checklists too if you want to practice criminal law. Whether you actually follow the checklist in a competent manner is another question.

Comment: Unless you get the perfect lawyer, how are you ever going to know?

Comment: Whether you are competent? Maybe you would not. But that is the question we are being ask here today: "Are practitioners competent?"

Comment: Maybe, it is possible to set up a checklist, a test of some kind. I know I have had a problem in practicing and I have had somebody go to court with me to say whether I did poorly or not. Judges will not say anything.

Comment: This is not very scientific but I think that, in assessing the competence of a practitioner, surveys done in both Canada and the United States on public perceptions of lawyers, reveal that maybe number seven or eight of ten of the positive feelings towards a lawyer is "did he win or lose my case." Number one is always "did he seem to be interested in my case." What the public value most in a lawyer is a demonstrated interest in their affairs; not whether he won or lost the case, or charged too much, or whether he demonstrated technical brilliance. On the negative side of the scale from one to ten, number one is always that the lawyer never had time for my case. So what is competence? What may look competent in a technical sense to lawyers may not be very interesting to the public who are concerned about competence.

Comment: Some jurisdictions in the United States are trying to solve this problem by a system of peer review in which everyone's competence is watched by all the other members of the bar. I know that Massachusetts is developing such a system. I am waiting to receive an account and description of it. I know of no jurisdiction that has really accomplished peer review. But maybe we should participate in the goldfish bowl, inviting the comments of our colleagues.

Comment: I would think that anybody that has any familiarity with the operation of peer review committees in the medical profession would shoot the first lawyer who suggested it ought to be done in the legal profession, because all you get into there is the most disagreeable and nasty kind of personal politics that you can imagine.

Comment: I have a question regarding the development of competence in junior lawyers and whether you envision any mechanism where senior lawyers can assist juniors beyond what is being done now. I know that junior lawyers in small firms or who operate as sole practitioners have a problem gaining experience. They cannot always retain senior counsel as co-counsel in a case. I know when I started out, it was kind of a hit or miss situation. Some senior lawyers that I went to for advice were very open, very helpful. Others did not wish to be bothered. I remember calling on one member of the Practice Assistance Committee and being told that the Practice Assistance was not geared to giving advice. I do not know what it is geared for; I never did find that out. Is there some kind of a mechanism within the Bar Society that can assist junior lawyers to develop competence when they do not have the resources of a larger firm?

Mr. Pugsley: I am surprised to hear that senior lawyers would turn down a request of that nature. I was just in talking to Mr. Justice Richard. He mentioned that he thought a big failure was that junior members of the bar did not approach senior people for advice. His own personal experience when he was at the bar, was exactly the opposite; he said he phoned people all the time and always obtained help. He mentioned one of my partners in the corporate field who, in teaching a bar admission course, offered to assist in any way he could, and without charge. My partner never had one request from anyone in that bar admission course, of a hundred and fifty students. I would think that most senior trial lawyers would be more than glad to discuss legal problems with you, for a short period of time certainly, and offer advice. I would be very surprised and disappointed if it is the other way around.

Comment: My experience has been generally as you say, but not totally so. But beyond that, do you think there should be some kind of a mechanism, where the onus would not be entirely on the individual young lawyer to seek advice. It seems to me that, after the bar admission course, you are left to fly on you own. Perhaps there is something on a continuing basis that should be done to address this problem of developing competence.

Mr. Pugsley: What do you think might be done? Does anyone else have any comments on that?

Comment: Toronto has the mentor system for defense of criminal cases.

Mr. Pugsley: I am not familiar with that.

Comment: The senior members of the criminal bar have established what they call the mentor system whereby they have made it known that they are available to junior members of the bar for the kind of consultation which you have described.

Mr. Pugsley: Terrific! How does it work?

Comment: It works well. The junior bar, of course, like it and use it; and the senior members of the criminal bar like it because it is improving the competence of their bar and because they have an interest in the criminal bar in Metropolitan Toronto. There is rather a cohesive criminal bar among practitioners actively engaged in criminal work.

Mr. Pugsley: That's excellent! We don't have anything like that at all.

Comment: In the mentor system, their name goes on a list and a mentor undertakes that he will not get involved with more than a maximum of five juniors. Once involved, the junior stays with the mentor and the mentor with the junior throughout that case.

Mr. Pugsley: Is the mentor paid for his services?

Comment: No it is voluntary.

Mr. Pugsley: That is extraordinary. I take it that some of the cases can take three or four days, not just an appearance for a morning.

Comment: The case could be a lot more than three or four days. It operates only in Toronto though.

Comment: Another thing that happens in Ontario in our bar admission course, with some forty seminar groups of about twenty-five each in the three centres Toronto, London, Ottawa, the seminar leaders, without any structured plan, do make it known that they will be available to these young people when they get out into practice and I know that they are called again and again to do so. I went through that experience myself.

Comment: I would think that you have described here a very good day today, de facto, volunteer assistance relationship between senior and junior counsel. I think it works very well; but the only program that I am aware of is the American one, in Massachussetts....

Comment: In the Ontario system, does the member actually go to court with the junior counsel?

Comment: They may actually go. Sometimes you cannot tell a person what to do. You have to go and do it by way of demonstration.

Dean Charles: Mr. Chairman, You mentioned that some practitioner are competent, and others are not. The figure you gave demonstrates a great deal of incompetence, particularly in property transactions, title searches, etc. Do you think there is anything that the law school can do in the form of skills training, clinical education and so on? I know that there is the general feeling that law schools ought to be doing more in terms of skills training to make junior counsel more competent, especially if junior practitioners do not get in touch with people teaching the bar admission course. If this is so, the responsiblity is, in effect, pushed on to the law school to provide skills training, beyond training in legal theory.

Mr. Pugsley: I certainly invite others to talk on that. My own personal reaction is the law school should not get into the field of teaching skills of that nature. Legal research should be emphasized in law schools. Skills should be picked up in practice, either in the law firm or in association with more senior people where no one in your office can assist you. If your client can afford to pay for it you should retain someone; otherwise phone up for assistance. I feel very strongly that the law schools should carry out traditional research and teaching functions, not skills training.

Comment: In becoming competent to draft a document or appear in court, you do not become competent automatically. It is a progressive state. The problem we have in law schools is in determining how many moot courts and drafting experiences we need in order to ensure that a person is sufficiently competent to go out and adequately represent somebody. You do not become competent the first time you challenge something.

Mr. Pugsley: Quite so.

Comment: Mr. Chairman, perhaps law schools could do more in the area of developing proper attitudes and motivations in lawyers. There is a failure in law schools to teach law students that the greater percentage of the practice of law is drudgery; nothing glamorous about it; damned hard, boring work, like searching titles. Failing to fulfil such a drudgery one hundred percent accurately, is not incompetence in the individual sense; it is incompetent in my view because the person fails to have the necessary attitude and motivation. And I think law schools, in some areas at least, do too much in the way of glamorizing the law and making it an intellectual pursuit far beyond what it really is. Perhaps feet of clay would help in such circumstances.

Mr. Pugsley: I agree with you, except that many law students do not find the study of law very glamorous or very interesting. I agree with you about the attitudal problem. We can do more to instill the idea of doing the best job one possibly can, emphasizing thouroughness and that sort of thing.

Comment: In a lot of respects the real problem is technically incompetence. A person who has gone through a few years of pre-law, three years of law, passed the exams and the bar admission course and all the rest of it--if he has the will and the common sense he can do practically any legal job competently. Law is not that complicated intellectually. You do not have to be a genius to do it. But it does require diligence and the willingness to persist in the drudgery. The real problem is one of attitude and willingness, determination and this kind of thing. I agree with you. I think the law schools do have a part to play here--a much more important part in that respect than in any other area of skills training. If they inject in the law student the right attitude before he graduates, he will acquire the skills training before he undertakes legal work. With all due respect, Mr. Dean one of the ways to instill this mental attitude into students, is to let them know that are not automatically going to graduate once they get into law school.

Mr. Pugsley: On the other hand, perhaps it is a little much to ask the law school to instill motivation or attitude in law students. Consider there are fifteen hundred applicants to a law school every year, a hundred and fifty are accepted. You have to be motivated to get into law school. How many jobs are there available in Nova Scotia for practicing lawyers? Very few out of a hundred and fifty graduating. For those who make it, one would think that they would have developed the right motivation along the way. It is difficult to know what the law school can do to instill motivation in people.

Dean Charles: I think that the motivation may be there. But other factors at work cause the best motivated person to take short cuts or do things that he probably realizes he should not be doing. Economic pressures, pressures of time or whatever, may have a bearing on such behaviour.

Comment: I do not know whether it is in the law school or through TV that people get the idea of what being a lawyer is going to mean. I remember the remark that Dean Read made to me when I was in first year contracts: that law is the grease that allows the wheels to turn in society. We are a part of the service industry, paper pushers. We often lose sight of that fact. Another thing I might add is the idea that lawyers do not always deal with disputes in court. The real purpose of law it to get that ordinary work done: to know the law, to evaluate the case and give a reasonable accounting; and after to settle by compromising. Instead we get lawyers digressing to one side or another, saying: "you have to go to court to determine that issue." Lawyers should settle such issues, unless it is absolutely impossible to do so, or unless it is an area of law that has never been handled before which needs a decision. The lawyer is supposed to give the client advice as to what his chances are, both in terms of liability and damages. But lawyers too often go to court, perhaps because they are reluctant to make a decision. Firstly, we forget that we are public functionaries. We do the drudgery; we are not all glamorous. Secondly, our job is not to be in court, and not to have our clients in court. Our job is to keep them out of there because courts, as far I am concerned, do not necessarily help. Who knows how the judge is going to decide.

Comment: It seems to me, however, that one might want to assign legal responsibility for competence between the law school and the bar. The fact remains that when a student of law is admitted to practice he is not really competent to practice law. Articles do not give him the variability of experiences that he needs to assist the public. He may have a certain minimal level of competence. But given the variability of experience in articles, it seems to me that we cannot say that he has the capacity to handle any legal transaction. Is that fair or not fair?

Mr. Pugsley: That may be fair, except that one would hope that he would have the good judgement, if he feels he is out of his depth in some area, to get assistance. How many of us are competent in every field? I am certainly not--I am not competent in twenty-five fields of the practice of law. I cannot give tax advice or corporate advice or anything of the sort; and I would not dare to do so. And I am sure all of us have competence in very localized fields, not in general. I can only hope that new graduates will seek advice in those areas where they may go stray.

Comment: If a junior spends his entire nine months of articles in the registry office or in the law firm's library, researching or searching files, what level of competence can his principal assert a junior has to go out and handle a file on behalf of a client? Does the Barrister's Society appreciate that his knowledge does not produce a fair result for the unsuspecting client who does not realize the inadequacies of the training that lawyers get in law schools and in bar admission courses?

Mr. Pugsley: There is a checklist, as you know, that article clerks in this province complete as to what areas they have had experience in. If at the end of five months or six months, they have not had experience in particular areas, they usually come to their principal and say "Look, I have not had exposure in these areas and I must get exposure before I complete my articles". Now, that is the way it is done in our firm. I do not know what the bar society does with that check list. Mark, what do they do? Do you know? Do they do anything with it.

Mark Macdonald: I do not think so. I just recall filing papers recently. Nobody asked for the check-list. But they do hand it out when you initially file your articling papers on the footing that it is some kind of a prerequisite to admission. But nothing was actually done at the time of admission with that list, as far as I could see.

Comment: I think the solution is for members of the Bar and the Law School to sit down and decide what combination of legal experience the young lawyer should be given in articles. It is all very well to say, oh well, you should leave it to the good sense of the young lawyer to realize that he is beyond his depths. But is that fair to the public?

Comment: I can think of one case where a young lawyer, in the most competent manner, conducted an unnecessary piece of litigation. In the result, it was clear that the matter could have been settled by a little sensible negotiation. I do not know whether that thought ever occurred to him or whether he just wanted to have a large client. But the trial was very competently conducted with interlocutory motions and the whole bit, together with a bill of costs running to twenty or thirty thousand dollars at the end of it. How can you teach that type of thing ... it comes back to ethics and judgement and common sense.

Comment: One of the things that has always struck me is that the barrister's society and bar admission courses do not teach new lawyers how to run law offices. In the happy old days, when overheads were down, you could handle an office any way you wanted to. Today the lawyer is often overloaded with paper and files; and he often lacks a system to deal with this problem. Having much better training in managing his practice would certainly help.

Comment: I suspect that our problem of competence is not so much the recent graduate. It is somewhere down the line, a continuing problem.

Mr. Pugsley: Thank you very much, this concludes the session.

PROFESSIONAL COMPETENCE AND THE LAW

Fourth Session: Friday, May 29, 1981

SEMINARS 3

Speaker Page

Are Law Teachers Competent?

PROFESSOR L. TRAKMAN
Dalhousie Law School. 146

Discussion 148

PROFESSOR LEON TRAKMAN
DALHOUSIE LAW SCHOOL

A CONCEPTUAL FRAMEWORK

This seminar has been coined "a conceptual framework." The aim is to demonstrate the utility of advancing a conceptual framework within which legal education, in particular law teaching, can evolve in our law schools.

Any meaningful conceptual framework requires the development of a cohesive approach towards the teaching function and a co-ordinated base upon which to orient a syllabus. This structured framework operates at broad and narrow levels of abstraction. At the broad level, we plan our overall educational system; at narrower levels we implement this overall plan within the classroom, in individual courses and among identifiable students.

A conceptual framework also embodies underlying goals and assumptions. Consideration here must be given to the nature of such goals and assumptions, the methods of implementing them, and their effectiveness in the context of the law school.

Consider the goals and assumptions of legal education. Firstly, should the goal of a law school be to institutionalize legal education within a university setting; or should legal education evolve within a practice-oriented setting? Secondly, should the substance of legal education be theoretical in nature, or are non-theory skills fundamental components of law school training? Thirdly, should law schools promote a general education in law; or is specialization a salient component of legal education?

Finally, upon which of the following goals should we, as teachers, concentrate: conveyance of information about law or ingraining analytical skills within our student body; morally neutral or morally decisive principles; verbal or written, adjudicative or non-adjudicative skills?

Each of these questions has a direct impact upon the operation and efficiency of our educational system. Our efficiency is influenced by the amount of theoretical training which we provide in law school and the manner in which we transmit such training in the educational process. Where clinical education is employed, we need to consider how it should be utilized; in simulated or non-simulated form, among seniors or non-seniors, in poverty law only or in other areas of law as well. We also need to determine the suitable arena of legal specialization; its nature and relationship with non-specialized areas. Finally, in evaluating the moral content of legal education, we need to consider to what extent we can teach law students to be moral, morally aware, or at least responsive to codes of ethics.

Educational goals and assumptions must also be related to the recipients of those educational services, the students. We need to consider their backgrounds, their needs and interests, their personalities and characters and their short and long term goals. Central to this issue is the question of how effectively we can and should educate diversely talented students who possess dissimilar educational goals and who are destined for varied careers in general practice, government service or para-legal work.

The goals of law students must also inevitably be evaluated in the light of the interests of the public. As educators, we need to consider the hierarchy of social needs and our ability to educate law students in response to those needs. In particular, we should evaluate what the public expects of lawyers and how we best meet such expectations through the educational process.

Finally, our concerns relate to innovation: what educational innovations do we value most, and how can we introduce them into the educational system most effectively? Specific concerns here are likely to be varied. Significant curricular reform may be favored for economic and/or for pedagogic reasons. These might well encompass a reduction in the number of course offerings; a diminution in existing categories of law courses; and/or an alteration in the content of individual courses.

Regarding specialization, we may wish to increase or reduce the number of existing specialist courses in our syllabi, introduce special interest components or specialist clusters, or even create specialist law schools which cater to specialist needs.

There is no limit to possible innovations that might arise out of a new conceptual framework. Educational changes may well include reducing law school training to two years or, alternatively, increasing it to four years; creating a two-tier educational system in which lawyers are trained either as solicitors or as barristers; and developing a broadly based clinical approach towards education in which legal training is provided by clinical means.

Yet a conceptual framework is most necessary if we are to promote a continually viable educational system. Establishing a solid educational structure means carefully rethinking our educational goals and assumptions, our method of implementing such concerns and must importantly, our success in doing so.

In fulfilling each of these functions, we have to ask ourselves some very sensitive questions: are we doing a worthwhile job as teachers and are we properly equiped to educate the lawyers of tomorrow? In responding to these questions, we may well come into conflict with traditional conceptions of "academic freedom", for, by questioning our abilities and skills as educators, we challenge our very academic automony. However, I sincerely believe that the end justifies the means. We are professionals; we are possessed of a public responsibility; and we are obliged to educate in the interests of both society and the lawyers of tomorrow.

Hopefully, this introduction has offended someone enough to provoke an aggressive attack in rebuttal.

DISCUSSION

Professor Macaulay: I will try to be helpful. I am struck very much by a study the Chicago Bar by Jack Heinz and Ed Lowden. They raise the picture of what it is lawyers are doing, who they are, where they are going and so on. One kind of division they come up with is the idea that, at least in the City of Chicago, there are multiple legal professions. They are very crystal clear that the people in each "profession" will never interact with the people in the other legal "professions." They all call themselves lawyers. When you look under Attorney in the yellow pages, they are listed alphabetically there. But actually, we are talking about very distinct legal professions. I suppose we do not want to go too far with this distinction because any lawyer can potentially get any kind of case. Still the distinction generally does prevail. It raises all sorts of questions of "symbols." What of the differences between the "symbol manipulators" and the "people persuaders?" The symbol manipulators are the people of the great giant law factories who make a lot of money; they have lots of prestige and they write opinions and briefs and that kind of thing. Compare them to the "people persuaders" who are the people who settle auto accident claims and do these kinds of things. One of our problems is that we are all reputedly lawyers together: the lawyer from the night law school who pays in order to get some sort of marginally adequate education and the person from the most prestigious law school who gets the best education going. They are all equally lawyers and we cannot deny that. To do so would be to attack the view that, with effort and ability, anyone of us can grow up to be an Abraham Lincoln.

Professor Kirby: Heinz found that there are several thousand of lawyers in Chicago who do not even have offices. They just have answering services; they float in and out of the court house and they deal with their clients in the corridor and the like. Lawyers range all the way from that position to senior partners at Baker & MacKenzie. We are trying to train a universe of people for a universe of different things and by identifying a core which is common to all.

Professor Cramton: My comment is in reaction to this study of the Chicago Bar. American lawyers may question to what extent the Chicago Bar survey data is reliable, given the generalizations made about lawyers. The points made thus far seem to me to point to a myth, a myth of unitary work. In fact, under the name "lawyers", we have an aggregation of quite different professions; they have different needs, use different information, use different skills, and have very little in common except that they are all went through a process at an early stage of their career, that is, being admitted to the bar. There are such monumental disagreements among these constituent groups about what ought to be done in legal education and about their own economic self-interests. Heinz and Lowden are essentially talking about status, hierachy and stratification. The point is that lawyers who are "people persuaders" go to distinctive law schools. They do not graduate from any of the elite schools. If you attend the "people persuader" schools, you cannot qualify for the prestige specialties that have the highest earnings, that have the highest prestige in the profession and the largest corporate practices. There is a conspiracy of silence about all these things in the United States. I cannot speak for Canada. In the States, you can go to meetings where people talk about law practice and legal education as if it were unitary system. Rather there are hierarchies, stratifications and pecking orders in the legal profession. These forces determine the orientation of each law school, what kind of people will attend that school, what its curriculum will be, and what kinds of skills it needs to teach. What holds us together as a profession is a very limited range of common denominators, information, skills and abilities. We need to appreciate the pigeonholing process. The question is how can each type of school maximize upon the contribution that they make to their law students; how can each contribute to competent legal education, given the different interests of its students and their different public responsibilities?

Professor MacDonald: May I respond to that? When a law school is worried about its diminished image it is often out to hire people from the most prestigious law schools who use the case materials of the most prestigious law professors. They then get a Harvard case book and start off on page one and fight their way through to the end. They are not responding to the needs of their students; they are doing nothing of the kind.

Professor Cramton: That is right. These people are bound to be unhappy in the environment you described. They are going to complain about students they get; they are going to complain about their own disappointed expectations and aspirations. They are going to try to create aspirations in the students which are inevitably defeated. And they are going to engage in the kind of writing which is designed to get the attention of the more prestigious schools so that they can move on up the teaching ladder, rather than commit themselves professionally to a function in what they feel is a limited environment.

Professor Trakman: The impression I get from these comments is is that law schools are multiple devices, satisfying multiple needs; and therefore we have to accept diversity within what law schools strive to achieve in response to different community demands. What troubles me is that if this is a correct assessment of the situation, then we need to reconceptualize the entire image of what training a lawyer requires within the context of society. We will have to reconceptualize in a very scientific way in order to avoid the problem of conflicting goals and duplication of effort. We cannot create the one general lawyer to satisfy a multiplicity of purposes in this technological age. What is the end-product of all this likely to be? Law schools will have to serve difficult purposes. Will the national law schools remain as theoretical and academic centres; and what happens to "other" law schools? Will some schools join the mainstream movement; while others assume restricted functions. And if restriction is the route chosen, what will be emphasized: poverty, family and criminal law?

Professor Hurley: I wonder if our whole discussion of incompetence is a myth. I did not hear anything about competence or incompetence from 1960 to 1970. During that time there were no law admission tests; and there were no clinical courses in law school. I have heard more about competence and incompetence since 1980 than I did from 1960 to 1975. And, you know, I don't think it [incompetence] is there at all. I think the reason for this preoccupation with competence lies in the fact that we have gone into the business of insuring each other. Once we started malpractice insurance, people really started bringing actions against lawyers. The more actions that were brought, the more suspicion there was of lawyer incompetence, teacher incompetence and judge incompetence. It seems to go in this ever-increasing circle. Probably there is often no incompetence at all. And where there is any incompetence, it is in the traditional subjects, especially in the property field--lawyers missing dates, their errors in searching titles and in conveying property etc. At the other extreme, there are downright crooks who spend their client's money; but that it is not a matter of incompetence. It is a matter of criminal tendencies which exist in some lawyers just as they exist in some clergymen, and in some politicians. What are we doing talking about incompetence here?

Law schools have to teach in relation to those they serve. The University of New Brunswick should not be thinking about trying to be a Harvard. We should think in terms of serving the society in which we function. We are training lawyers to graduate from law school; we are not training them to go to the supreme court, not to be chief negotiators, leading criminal lawyers or top property conveyancers. Surely our basic educational functions involve treaching basic legal skills. That duty has not changed since I started teaching in 1960. In that regard we can do something worthwhile. The question of competence or incompetence that is generated today simply does not relate to what we do or should do as law teachers!

Professor Cramton: We can be fairly confident that the concern of what is called lawyer competence is a function or attibute of various things. One is the genuine public interest in establishing what the profession does. That is quite a legitimate concern. Behind it that lurks two other concerns: one is a general social trend to question authority, fueled in the United States by such events as Watergate, namely a public fuss about all the institutional behaviour of lawyers. Lurking behind that are the structures which lawyers themselves have created in order to control the numbers, composition and activities of the bar. Here there is the view that there is only one really effective way for lawyers to protect themselves against competition and that is to keep out new entrants; and the most effective way to keep out new entrants is to run up the cost, by providing barriers to going to law school and by running up the cost of law schools. We could put up barriers to passing the Bar exam; we could create barriers to getting admitted to practice. I do not think Bar organizations and legal organizations are consciously doing this; but lawyers are very unsettled about potential changes in the mores of the profession. Advertising of legal services programs, public interest lawyering and activist judging threaten some of the ideology and self-confidence of the legal community. So do hordes of lawyers pouring of law schools who get admitted to the Bar and provide competition. Now the talk of national law firms and clinics is very frightening to the practitioner; and it should be.

Professor Macaulay: That is right. I came from a conference on delay in the courts about two weeks ago. One of the statistics in California presented at the conference--I do not know if it is true--is that one out of every nine adult males in San Francisco is a lawyer.

Professor Hammond: I think that we all recognize we have to break down the monolithic kind of law school model, restructuring and rearranging the profession. It is, of course, fascinating to go back over the border and observe the tremendous chase after the maximization of prestige in American law schools. The problem is less serious in Canada. We do not have the same social hierarchy. When I was at Illinois, we were always trying to top off Michigan.

Dean Iacobucci: We can go on for hours on vague sociological impressions of one form or another. I had the blessing of living in New York City for three years, working in a Wall Street sweat shop. Yet things are not too different in Canada. By definition, we inherit everything from across the water to the south of the border: we have schizophrenia in our infra-social structure. American values permeate our educational institutions. I also think there is a comfort in our being Canadian on a philosophical level. We tend to stay out of the troublesome issues, like the Watergate syndrome, because of our English reserve.

Professor Cramton: I think there is a difference in attitudes between Canada and the United States. Canadian have a dual heritage, having cultural links to both the United States and Britain.

Dean Iacobucci: National law schools in the United States still provide a Wall Street type of service. Take the corresponding situation in Canada. I think just last week one of the Toronto firms reached a hundred members. That says something in terms of the stratification of Canadian practice compared to the United States. Until very recently, large Toronto firms would not refuse motor vehicle cases, cases that would not even see the inside of a wall street office. Specialization is taking place much slower in Canada. So I think there are professional, cultural, attitudinal differences between Canada and the United States.

Professor Trakman: May I interject with a query? Are there any fundamental differences between our educational model and the American educational model. By and large you will find the same techniques being used in our schools in Canada as we used in the States: the case book, the appellate advocacy process to a degree, etc. Many of our graduates take Masters degrees in law in the States, as do a number of American law teachers, unless they have gone to top American law schools for their J.D. degrees. The English influence, at least educationally, is far less prevalent in Canada than it might seem, in spite of the fact that our institutional principles of law may well have an English heritage. Are we not really a reflection of an American model, but on a smaller scale?

Professor Iacobucci: I think there is a difference of scale and attitude.

Professor Kirby: It seems to me that in Canada you do not have a Harvard or Yale which serves as a model for everybody to strive towards.

Professor Trakman: Actually Canadian law schools do study the Harvard and Yale model very carefully. We also have disparities in the qualities of our Canadian law schools. But in terms of quality, it is that there is a much more steeper institutional structure in American law schools. Canadian schools operate at a much more parallel level; there is less diversity in the quality of Canadian law schools; there are also far fewer law schools in Canada than in the States.

Professor Ribstein: The major change in legal education in the United States in the last thirty or forty years is that the gap between the top schools and the bottom schools has radically narrowed. Harvard is probably ten percent less good than it was thirty years ago; and I think that is probably true of most of the other major schools. And the John Marshalls are five hundred percent better than they were. The gap is still very considerable; but you are moving a little bit more toward the Canadian experience of law schools in which there is a smaller range in quality and a more limited range of resources.

Professor Trakman: One of our reporters said before the conference began that he wanted to come here because he sees we have a great many Americans speaking on the panels. His hope was to identify the fundamental differences between the American and the Canadian legal systems. He asked: "How can you compare systems even in the educational sense, if judges are appointed very differently in each system and if the whole process of justice, the constitutional and political structure of each system is radically different? Yet in terms of discussion today, it does not seem that we have such a distinctive difference of and in approach. On the contrary, I have the feeling that a lot of what has been said by our American educators is directly relevant in the Canadian context. Are there any comments hereon?

Professor Hammond: In Canada, we are talking about maybe eighteen, twenty, or twenty-two law schools, with not a wide range between them. There will be some variations but nothing like in the States. Yet Canadian law schools have not developed uniquely Canadian educational programs in law. Perhaps we are too slavishly following a model from south of the border, or from Oxbridge.

Professor Trakman: May I pose another question: if specialization is a reality in our profession should we start looking more and more towards specialist instutitions? If the suggestion is "yes," then the second question is: "how do we activate such specialization? Some specialization is taking place already. Much of it happens by osmosis, in accordance with professor's interests. But where is the beginning and where is the end of specialization; and how do we examine its progression?

Professor Ribstein: I would like to respond to what Professor Cramton said a little while ago and to Professor's Trakman's question. I feel like I am one of the people Professor Cramton was talking about. Coming from the University of Chicago and now teaching in a place called Mercer Law School in Macon, Georgia, I realize that they are very different types of institutions. So I ask myself: to what extent do I carry over to Mercer the University of Chicago model. I guess I have come to a different conclusion than Professor Cramton, that is, the things in common outweigh or outnumber the things that are different as between the two institutions. Of course I do not have the same approach as a teacher to, for instance, securities regulation compared to what I learned in law school. I know I am not teaching people who will go into the big firms and so forth. To that extent, I change the subject matter around. But in the overall, I think that my students need much the same basic grounding that I got.

My other comment to Professor Trakman's question is basically this: granted that we need specialist institutions--assuming that we do--how do currently constructed law schools decide what their mission is going to be? In other words, I am debating whether we need specialist institutions. And I am asking the question that, assuming we do, how do present law schools determine what kind of specialist institution these are going to be?

Professor Macaulay: One of the great strengths and weaknesses of American legal education--Canadians will have to speak for themselves--is the ability to make one's own mistakes. Take my contracts course. Who is going to tell me how and what I am going to teach in contracts? When I arrived at the University of Wisconsin from the University of Chicago I adopted Kessler and Sharp. The book was considered by colleagues, in those days, to be a pretty radical contracts case-book. I was told that Wisconsin students could not cope. But they did. They did very well. Law schools are collectivities; yet they are often so loose in their bonding that you might wonder if there is any real bonding at all.

Professor Kirby: I have been connected with a number of law school faculties too. Each is an aggregate of individuals, doing their own thing. Essentially their curricula are made up of whatever group there at that time wants to teach. I do not think that is going to change fundamentally.

Professor Cramton: It is true, I think, in the United States that law faculties have a notion of individual faculty autonomy. The lone ranger school of legal education or laissez faire is the one thing that all faculty members agree upon. That is, each member of the faculty has to be able to do his own thing as long as doing so does not interfere or oppose requirements of other faculty members. That is the common compact. And that leaves no collective responsibility for the curriculum as a whole.

Professor Trakman: Does that not present problems?

Professor Kirby: It does present problems. It results in some holes in the curriculum.

Professor Cramton: It gives rise to holes, gaps, the absence of structure. Compared to other professional schools even in the United States--medical schools and so on--the attitude in law schools is very, very different; there is more individual faculty autonomy than one tends to find even in arts colleges.

Professor MacDonald: I just want to make a couple of points about symbols here. It may well be that there is a great myth of autonomy in the selection of course materials in the United States. But I venture that there are probably more in-house casebooks produced in eighteen Canadian law schools than there are in one hundred and seven United States law schools. You can take a course like contracts. The number of people in Canada who actually adopt a commercially produced model is far less than the number who cut and paste their own material. You could have a Canadian school which has six sections of contracts and six different sets of in-house materials, for instance. I do not know whether that phenomenon is present in the U.S.; but I suspect that West, Foundation and Little, Brown pretty well dominate the contracts book market through their multiple offerings. So when we talk about freedom, we may be talking about freedom in a restricted way. When you look at the six different sets of contract materials, and each includes Paradine v. Jane, then the difference is not that much.

The other point is, given the Tory tradition which we suffer from in Canada, we produce a different kind of law school when compared to the United States. We also produce a different kind of expectation in the students. American law students at schools like Michigan, I found out, are far more aggressive then my students were at Windsor in Canada. We do not carry the burden of the Declaration of Independence as American students do. Sometimes I think that enters very deeply in the psyche of our students and faculties in Canada.

Dean Iacobucci: I just want to make a point on academic freedom *vis à vis* the instructor and his freedom to choose what and how he will teach. I do not think that academic freedom involves a big risk. Professor Macaulay has been through a good law school; his colleagues are very respectable; they have the confidence of experience. There are controls. There are pressures of colleagues that are put upon us in terms of the materials that we are suppose to teach. There are the pressures of the students; and there are pressures of discipline in the environment. ... As a result, I do not think that, in the professional context, we really face too many signs of abuse of academic freedom.

Professor Macaulay: But there are coordination problems. Our educational structure is really set up to make it almost impossible to make those kinds of school-wide changes. At Wisconsin there would be warfare if we started pushing our colleagues around; so it is better not to do so. What does that lead to? Within the present structure, each one of us can make marginal changes. I am free to do that in contracts. But I cannot touch torts. The student, in turn, has relatively little choice of courses in the first year. Even the apparently wide open choices in second and third years are not so wide open because these courses also have to meet certain requirements, within certain hours, etc. I do not think that the individual teachers abuse their freedom so much; but they do have coordination problem. If you think that the institution has to make a change, despair, because I think it would be awfully tough to do so. The tradition is that you have to fight to make institution-wide changes.

Professor Trakman: It seems to me that I have seen something of a significant difference between the two remarks: your remark, Stewart [Macaulay], and Frank [Iacobucci's] remarks. Frank basically suggests that teachers are really doing a fairly good job in the expression of their academic freedom; but Stewart suggests that, by way of reciprocity, we leave one another alone. In Stewart's proposition, whether or not teachers are doing a good job is not the issue; we avoid that issue because we want to keep our faculty and we want to keep them happy. What happens if we discovered that, in effect, there was tremendous overlap between courses; people were teaching the same subject matter in the exact same way; students were taking six business courses, and in the six business courses they were getting more and more of the same information, taught in an identical manner? What if there was no real attempt at giving students a solid foundation in law? What happens if we did discover this is to be so; if we did investigate? Do we really know what law teachers do in the classroom? Do we want to know?

Professor Cramton: I think the structuring of law courses is the real problem; not so much the question of academic freedom. Let me give you an example of my experience as Dean at Cornell. We have, as most schools have, a first year required course called "Criminal Justice." We had four people teaching it, of which three took the notion that it was a course in substantive criminal law, the fourth took the notion that it involved fifty percent substantative criminal law and fifty percent criminal procedure. Well he was, in fact, the most effective and powerful teacher in the area, so he tended to have the largest sections. The effect in the upper class offerings in the criminal law area--some of which were procedure offerings--was just devastating. It led to all kinds of problems among students who either had had him or had not had him in the first year. We tried for seven years to get the curriculum committee and faculty to say "I do not care which way you come out in respect of criminal justice, but make it one way or the other." They absolutely refused to do so. They would not say whether it was to be a criminal law course, a criminal procedure course or both." I do not that it is a question of academic freedom. That is a question of having any kind of structure at all on which you can build advanced offerings.

Professor MacDonald: Perhaps I am the world's leading anarchist; but the last thing which you want to do is modify a curriculum or a collection of individuals. I want a law faculty which is a collection of individuals. I do not want a faculty, that disclaims responsibility for what they do on the grounds of institutional structures. Furthermore I think a trite case, like Harrison v. Carswell, can be taught probably in ten different law school courses; and I gather in the best schools it is taught in ten different law school courses. And the overlap and the fomenting of conflict between various professors in their attitudes towards such a decision is what keeps legal education vital in a period of intellectual stagnation.

Professor Cramton: The implication of this statement is troublesome. If we required every student to have twenty hour of instruction of whatever character each member of the faculty decided was appropriate, there would be enormous difficulty. There must be some correlation between curriculum and what is out there in the real world.

Professor Trakman: That is, perhaps, an appropriate point at which to stop, given the lateness of the hour. I invite you all to attend Roger Cramton's address tonight. He will deal with this same subject in his presentation on Professional Competence in law in North America; the address promises to be stimulating.

PROFESSIONAL COMPETENCE AND THE LAW

Dinner Address: Friday, May 29, 1981

INCOMPETENCE: THE NORTH AMERICAN EXPERIENCE

Speaker Page

PROFESSOR ROGER CRAMTON
Cornell Law School 158

PROFESSOR ROGER C. CRAMTON
CORNELL LAW SCHOOL

Professor Trakman, Dean Charles, Justice McIntyre, distinguished guests, competent and incompetent lawyers, ladies and gentlemen:

I am told, on good authority, that an after dinner talk should start with a few well-chosen stories. There are risks, however, in telling stories. One of them stems from the enormous rapidity with which the jet-stream and the television tube carry stories around the western world with nearly the speed of light.

A year ago I was attending the annual judicial conference of the United States Second Circuit. The federal judges and the elite of the bar from the States of Connecticut, Vermont, and New York were gathered at a pleasant watering spot for discussions and recreation. At the formal banquet, Senator Kennedy, then the chairman of the Senate Judiciary Committee and a candidate for President, gave the after dinner talk. He began his remarks with the story about the man who died in the Johnstown flood. The audience responded to the story, but in a strange way: there were titters and giggles at inappropriate points. By the time the punch line came, Senator Kennedy was painfully aware that something was amiss. He turned to the presiding officer and and said, "You people must know something I don't know." He was told that was indeed the case--the same story had been told, at greater length and with varying detail, by a Washington lawyer at a session of the conference earlier that day. Senator Kennedy's advance man had failed to do his job and some of us sensed then that his try for the presidency also was destined to fail.

My advance man informs me that you were not exposed to the Johnstown flood story in your session this morning. It is an old chestnut of the pearly gates variety. A man who dies in the Johnstown flood goes to heaven. There he is informed by St. Peter that new arrivals are expected to address the heavenly multitude. St. Peter inquires about the man's topic. "Well, I've learned a thing or two about floods, so I guess I'll talk about that." "Perhaps another topic," suggests St. Peter, "would be of more general interest." "That may be, but after what I've been through, I have floods on my mind." "All right," replies St. Peter, "but remember ... Noah will be in the audience."

The story is appropriate this evening because of the audacity of the topic I have been assigned and the superior qualifications concerning it of many in the audience. "Incompetence: The North American Experience." It encompasses all of Murphy's Law ("anything that can go wrong will go wrong") in a large part of the Western World--not only the United States and Canada, but also Mexico and Central America. The breadth and complexity of the topic is mind-boggling.

Walt Whitman was once asked at a formal occasion to summarize the role of the university in modern society. He wisely demurred, "I'd rather not." Perhaps I should take the same course.

My difficulty is two-fold. First, my qualifactions to address the issue of lawyer incompetence are modest at best. I am a legal educator, not a judge or practitioner. Second, my experience differs in many ways from yours. For nearly thirty years I have been involved in legal education as a student or teacher; but the experience is almost entirely confined to the United States. Those of us south of your border--having appropriated the word "American" as our own--are sometimes prone to view our experience as normative for all of mankind, and surely for Canada. Whether our experience speaks to your realities and problems is a matter which you will best be able to judge. Perhaps a spark of recognition will be kindled here or there by what I say; and, in any event, observations from the colossus to the south may have at least a quaint anthropological interest.

There is one admonition I am confident we share. It is the advice Thurman Arnold was prone to offer young lawyers. Arnold was a colorful and exuberant figure, who entered practice on the frontier in Wyoming, became a law teacher, then successively a federal government official and federal judge, and finally closed a remarkable career as the founding partner of what is now one of Washington's major law firms.

"There may come a time," Arnold would growl to young lawyers, "when, despite your best efforts someone must go to jail. When that time comes, make sure it's the client."

What sounds at first blush like a cynical observation is in fact one of the foundations of the public responsibilities of lawyers. The client is entitled to zealous representation--to put the state or the adverse party to its proof. But when the lawyer assists the client in fabricating evidence or obstructing justice, he has joined a criminal conspiracy and should go to jail along with the client.

Perhaps we can agree on something else--the tendency of all professional groups to take themselves very seriously and to respond to external criticism by talking of a crisis, appointing study groups, and creating new terms to describe old and inevitable problems. "Lawyer competence" is a new term addressed to an old and inevitable problem: the desirable level of quality in the day-by-day delivery of legal services.

I am told that the Supreme Court of Arkansas recently devoted a day of argument to a case involving the rule against perpetuities. The situation was a complicated one and several of the judges got very involved in the intricacy and beauty of applying ancient doctrine to the novel situation before them. One of the judges, carried away by the enthusiasm of the moment, asked counsel whether the particular variation was much discussed in his part of the state. "Your honor," came the straight-faced reply, "in Booneville we talk of little else."

"Lawyer competence" is the term of the moment and some of us, attending useful conferences such as this one, talk of little else.

This evening I offer brief remarks on three questions: (1) how serious is the problem of lawyer incompetence? (2) what are some of the fundamental elements of lawyer competence? and (3) what are the implications for legal education?

I

Chief Justice Burger and other prominent jurists have argued that there is a serious problem of lawyer incompetence in the United States. The Chief Justice was widely quoted as stating that as many as fifty percent of trial lawyers in federal district courts were "incompetent"; and later he observed that if the same standards of quality control were applied to recent law graduates as are applied to automobiles, the rate of recall would be very high.

Implicit in these statements is an argument along the following lines: the legal profession has a serious problem of competency; the principal source of the problem is legal education; and the solution is required courses in one or another subject of a practical nature.

What is the evidence to support these claims that as many as fifty percent of lawyers are "incompetent"? While the assertions are limited to trial lawyers, who form less than one-fourth of the bar, it is not apparent why the level of competence of office lawyers would be any higher. Unlike litigators, who perform in public under the scrutiny of a judge, the remainder of the profession carries on its work in the privacy of the law office.

The available empirical data does not support the extreme assertions of massive incompetence. For example, an evaluation of the performance of trial lawyers in United States district courts, carried out by the Federal Judicial Centre, resulted in a finding that only 9 percent of trial performances were less than adequate. Moreover, inadequate performers are not distributed evenly across the lawyer population. For example, no lawyers from the most elite schools were found among the inadequate performers, while other types of lawyers were overrepresented in this group.

Trial lawyer inadequacy also cannot be attributed to the inexperience of the large number of young lawyers who have entered the profession in recent years. Since only a small portion of the totality of lawyers are admitted to the bar each year, lawyer incompetence that involved one-half of the profession could not be a new problem attributable to recent graduates. Moreover, studies indicate that, aside from the learning effect of one or two trials, the performance of young lawyers is as good as that of older lawyers. Finally, other data suggest that recent graduates are more highly qualified than those in earlier periods. Selectivity in admission for law schools, higher qualifications of law students, and improvements in legal education--all suggest that things are getting better rather than worse.

In short, available evidence suggests that lawyer incompetence is not a new problem but an old one, and that the dimensions of the problem are not of crisis proportions that might warrant extraordinary measures. Even though the attacks on lawyer competence and legal education are overdrawn, however, Chief Justice Burger and others have raised important questions.

The level of competence of any profession can be improved; and improved education is surely one of the principal avenues of possible progress. But improvements in legal education must come from within; they will not flow from attempts by the bench and bar to impose them.

II

What do we mean by "lawyer competence"? At the outset we need to distinguish the ability to perform a task at an acceptable level and the reality of actually doing so in a particular situation. Clients are interested in lawyer performance--the routine delivery of high quality legal services--not the capacity of the lawyer to do a good job.

Repeated studies show that most deficiencies in lawyer behavior are not due to lack of competence, narrowly viewed as the ability to do a satisfactory job, but to other reasons: inattention, laziness, the press of other work, the limited economic rewards of a particular matter, or just plain mistakes. Thus any comprehensive approach to lawyer competence cannot be limited to the two essential elements of, first, knowledge of legal theory, doctrine, and practice, and, second, skills of understanding, communicating, and applying that knowledge. It must also include such values as integrity, industry, and professional reliability.

Preparing individuals for the legal profession is complicated because the profession is so diverse and changeable. Law school graduates travel many different paths after graduation. Although there are common elements that unite them, legal careers are highly varied. Review of the current activities of a Cornell class that graduated twenty years ago, for example, will reveal a few exotic choices, such as the choice made by one graduate who went into gold mining and another who went into the manufacture of mattresses. But consider the diversity among those who are practicing law: a trial lawyer specializing in product liability cases; a general practice lawyer engaged in routine wills and real estate transactions; a patent lawyer on the legal staff of a large chemical company; a lobbyist representing the timber industry in Washington; along with the usual mix of corporate law practice in large firms, government legal work, and a few who have become judges, law professors, or politicians. Lawyers, it is clear, do a great many different things.

Moreover, our society changes very quickly and lawyers are always on the cutting edge of that change. During a forty-year career, dramatic change in law and legal institutions will occur. This is one reason why it is a mistake to rigidify the law curriculum by mandating particular courses for admission to the bar. This not only turns law school into a boot camp rather than an intellectual experience, but the prescription will soon be out of date. Requiring a course in bailments, as South Carolina has done, flies in the face of Whitehead's reminder that "information doesn't keep any better than fish."

III

What are the implications for legal education of what I have said? Let me mention three.

First, either different law schools must prepare graduates for different roles in the profession, or all must concentrate on the common-denominator element--basic knowledge and skills that cut across all law careers. In the United States we do some of both: each law school has a somewhat different market for its graduates; and all law schools concentrate on the common-denominator, knowledge and skills. That is, legal education in some respects is differentiated in an effort to prepare graduates for somewhat different professional roles; but the common elements are stressed everywhere.

Second, the most important skills law school can teach are those that will help law graduates adapt to a changing society and to grow as professionals. Continuing command of relevant knowledge and the honing of needed practice skills depends more on intellectual curiosity, skills of self learning, and integrity and professional responsibility than they do on the information content of law school courses.

Third, legal education cannot be focused on the nuts and bolts of law practice. The speculative and theoretical must be given a central place in the law curriculum because they stimulate the intellect, provide an overarching framework that makes information useful, and establish the foundation for any effective application of law. A lawyer cannot deal effectively with any problem unless he has a sound command of the moral and theoretical foundations of applicable doctrine. Problems of individual responsibility in criminal law are an example, such as a case involving the claim of self-defense. Only the lawyer who understands the moral and theoretical foundations of individual responsibility for crime can operate effectively in cases in which persuasion of a jury, framing an instruction for the judge, or seeking a new departure from an appellate court is the task at hand.

These implications are borne out by a study of professional competence done in North Carolina some years ago. It is perhaps the only large-scale empirical study of factors related to professional competence, in this case in the medical profession.

A group of experts evaluated the quality of the daily work of a large group of general practice physicians. They found that about one-fourth of the physicians routinely met the highest standards of medical care in dealing with their patients. Most of the rest usually did, but there were some significant lapses. And a small percentage were guilty of much more frequent and serious lapses.

This performance information was then correlated with everything that the researchers could find out about the physicians: age, sex, race, schools attended, years of practice, clinical experience, courses taken, and the like. Data concerning all of these variables was run through the computers and analyzed, only to reveal that performance did not relate to any of the ones mentioned thus far. But it did correlate with an odd assortment of things, such as class standing in medical school (a modest correlation), number of professional journals subscribed to (a more substantial correlation), and attendance at continuing education courses held out of town (a strong correlation--although attending courses given at home was not significant!).

The report goes on at great length to discuss these and other factors and never states what leaps out at you as you read the dreary statistics. What differentiated the physicians who always did good work--whether or not they had a cold, or a family problem, or the patient could pay--was a set of intangible qualities. They cared about medicine in the sense that they had a strong intellectual interest in it; they cared about the well-being of their patients; and they cared about their own image as professionals. In short, they had a sense of craftsmanship--the self esteem that leads a person to internalize standards of behavior and reinforces pride in one's work--that led them to provide a high quality of service routinely. When similar studies of lawyers are carried out, I am confident they will yield similar results.

The difficult task of legal education and of the organized bar as a supporting institution is this--how best to nurture these delicate, intangible qualities in young men and women who are drawn to the law? How can we feed their intellectual curiosity, so that they will keep abreast of changes in the law through the indefinite future? How can we develop their ability to learn on their own and to be sensitive about the limits of their competence? For they cannot be truly competent lawyers unless they have sound ideas concerning what they can do and what they should refer to others. And how can we build in them a positive image of themselves as professionals, as craftsmen who take pride in their work--lawyers who always give good measure, whether or not the client can pay--because that is the only way they can look themselves in the mirror when they get up in the morning?

Much of the dialogue on lawyer competence is appropriately focused on minimum levels of performance for every member of the profession. My comments tonight have been primarily addressed to an equally important issue: elevating the aspirations for excellence among a portion of the profession. For it is one thing to meet minimum standards and quite another to match the best traditions of the profession.

Perhaps my theme is an utopian one, but Utopia must have a place in our dreams and actions. Oscar Wilde, anticipating a society in which the slavery of machines has banished the slavery of men, said: "A map of the world that does not include Utopia is not worth glancing at, for it excludes the one country at which humanity is always landing." Utopia must be on our maps of lawyer competence, with some guidelines showing how to reach it from this place and time.

Thank you.

PROFESSIONAL COMPETENCE AND THE LAW

Fifth Session: Saturday, May 30, 1981

PROFESSIONAL COMPETENCE: PRACTITIONER'S CONCERN

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INTRODUCTION

Three preliminary questions arise for consideration in this section. Firstly, how effectively and comprehensively are lawyers trained to be competent in legal practice? Secondly, what evidence do we presently have of incompetence in legal practice? Thirdly, how are problems of legal incompetence regulated, by whom, and to what degree?

Regarding the form of legal training, education in law is a collective responsibility: it rests with the teaching profession, with the bar and with the bench. The parameters of competence hinges upon the quality of instruction that is provided both before and after graduation from law school; it is an on-going process.

Regarding evidence of lawyer incompetence, various examples arise in malpractice hearings and disciplinary proceedings. Together they illustrate the parameter of unethical practice and procedural violation that occur in the day to day conduct of lawyering. Lawyers fail to file documents, they disregard prescribed notice periods, and they sometimes misappropriate funds.

Finally, the regulation of lawyers is facilitated through codes of professional conduct, through rules of ethics, and corresponding bylaws. They define the parameters of permissible legal practice; they illustrate instances of incompetent legal performance; and they prescribe the penalties which should be implemented in the event of such violations of professional standards.

The papers that follow evaluate lawyer competence from the prospective of law school and continuing legal education programs; and they reflect upon the controls that are exerted upon lawyers through professional regulation, litigation and punishment.

PROFESSOR EDWIN HARRIS, Q.C.
DALHOUSIE LAW SCHOOL

Good Morning, ladies and gentlemen. We are glad that neither fog nor the absence of police have prevented you from finding your way here this morning, and I hope we will be able to make your trip worth while.

I do not know if there is a particular reason for selecting me to chair this session except possibly because, theoretically, I am supposed to be both a full-time law teacher and full-time practitioner. I thereby have the excellent opportunity to demonstrate incompetence in both fields. Professor Macaulay and Mr. Justice McIntyre yesterday both declared that they are in favour of competence, and so am I, but I think that I am also in favour of giving everybody the opportunity of being incompetent. It enables you to keep on your toes if nothing else.

The format of this morning's session will involve a major address by one of our keynote speakers, Mr. Arthur Maloney, followed by briefer comments by two of our prominent local barristers, Brian Flemming and Peter Green, and then depending upon the time available, we will open the floor to general discussion.

Mr. Maloney is one of the well known barristers in Canada, and I do not propose to give a detailed introduction even though I have a lot of fine print in front of me from who's who. He is a Q.C., and has been a member of the bar of, what has come to be called at this conference, the most populous have-not province in Canada, Ontario. He was for many years a distinguished trial lawyer, he has been a Member of Parliament, he was the first ombudsman in Ontario; and he has been active in the Canadian Bar and a number of other organizations. He is also a much sought after speaker on legal and professional topics. It is with a great deal of pleasure that I call upon Mr. Maloney.

MR. ARTHUR MALONEY, Q.C.
BARRISTER AND SOLICITOR

I was pleased to have been asked by Professor Leon Trakman to participate in this conference on Professional Competence and the Law. I note that the conference has as its objective "promoting competence in teaching, judging and the practice of law."

I feel that we have reached a stage in Canada when it is not only timely, but essential, for all branches of the legal profession to scrutinize the way in which we are developing as a body and to search for ways and means to improve upon the level of service we provide to the Canadian public. As a practicing lawyer since 1943, I have become increasingly concerned in recent years about the way in which the legal profession is perceived by members of the public. I am strongly of the view that members of the profession must direct a great deal more attention to ensuring that we maintain the high level of competence that our profession in Canada has enjoyed over many years so as to renew the public's confidence in our ability to deliver a very high calibre of legal services. I feel therefore that we must all be greatly concerned about the present level of competence of the bar in Canada.

As you all know, the makeup of the legal profession in our country has undergone a dramatic change within the last decade. We have witnessed in Canada a virtual explosion in the number of lawyers entering the practice of law. An article which appeared in the Toronto Globe and Mail on May 19 of this year reported on the concerns that have been expressed about the large number of lawyers entering the profession as follows:

> The debate over whether Canada faces a glut of lawyers has spread across the country, dividing opinion among the public and the law schools on the one hand and the profession and its law societies on the other.
>
> Interviews with representatives of Provincial Law Societies and Law Schools show that everywhere but British Columbia and Alberta, there are serious concerns about unemployment among lawyers and about the impact on the public of ever escalating numbers of lawyers.
>
> But those anxieties are not likely to lead, at present, to imposed restraints on the numbers entering law.

The article refers to a recent poll conducted by the Law Society of Upper Canada in which Ontario lawyers indicated that controls on the numbers entering the profession would be beneficial to the public. The article states that:

> Those who would restrict numbers argue that too many lawyers reduces the quality of service because increased competition forces lawyers to take cases they aren't experienced enough to handle and to cut corners to handle more work at cheaper prices.
>
> Their opponents point out that there is no evidence linking competition with fee cutting and poor service. They also insist that because the need for lawyers is an immeasurable quantity there is no way to judge whether there are too many or too few.

The article points out that the number of lawyers in each province has at least doubled over the last ten years as a result of the 1960's boom in university growth. It points out that the respective Law Societies in the Provinces have no authority at the present time to control the numbers entering the profession since that power rests with the individual law schools which in turn depend on full enrollment for maximum financing.

Dean Stanley Beck of Osgoode Hall Law School is quoted as follows:

> The schools want their seats filled. The market does not affect this ... only the (University) Senate could limit enrollment, or the Minister of Colleges and Universities could--but is not likely to, it would be contrary to university policy, to say nothing of the political aspect.

The article concludes that, although the Law Societies exhibit concern about the problem, they have maintained a markedly distant attitude to the question of numbers:

> The Law Societies prefer to concentrate on questions of competence, which may or may not be related to questions of numbers.

In his annual report to the Law Society of Upper Canada for the year 1980, the treasurer, Mr. John D. Bowlby, Q.C., had the following to say about the influx of new members into our profession in Ontario:

> Unified concern has been expressed as to the number of lawyers which are now entering our profession annually ... again, not because an overly populated profession may affect the income of the individual lawyer, but in large part because of a concern that if competition becomes too intense, can this, or will this, or might this produce a lowering of the high standard of professional service which it is incumbent on our profession to provide. It is recognized that a solution to this problem may be difficult, elusive and contentious, but this should not prevent its exploration.

The treasurer went on to cite some statistics:

> What was efficient and adequate at the turn of the century can, by any realistic examination, no longer cope with a profession of 14,118 in 1981. It is not without interest to realize that one hundred years ago there were 1,215 lawyers; in 1960, 5,347; in 1970, 7,237. This graphically indicates the sudden increase that has taken place in the last decade.

Although the figures cited by Mr. Bowlby relate only to the Province of Ontario, they are indicative of the trend we are witnessing throughout Canada. The fact that the number of lawyers practicing in the Province of Ontario has virtually doubled over the last ten years will make it apparent to all that a very large and disproportionate percentage of the legal profession today is made up of young lawyers with less than ten years of experience at the bar. It is primarily as a result of this tremendous influx of younger lawyers into the profession in increasingly large numbers that it is my view that concerns about professional competence within the profession must begin at a very early stage of the legal education process.

In the pamphlet outlining this conference's program Chief Justice Warren Burger is quoted as follows:

> Beyond any particular system, however, is the fundamental fact that how lawyers are trained--during and after law school--will determine their skills as advocates and ultimately the quality of our justice.

In my view the quality of justice which we can expect to enjoy in Canada in the future will not only be determined by the training that future lawyers receive in our law schools, but will also be very greatly influenced by the methods employed by our Canadian Law Schools for the selection of the young people who will enter those faculties and who will ultimately make up the Canadian legal profession.

I am strongly of the view that concern about professional competence must begin at the very earliest stage, that is, with the procedures of admission that are followed by our Faculties of Law in Canada.

The types of individuals who are selected for admission into our Law Schools will have a profound bearing on the future competence of the profession as a whole. In recent years I have become most concerned about the way in which these young people are being selected for admission to Law School. The present procedures of admission, as I understand them, place what I consider to be an undue emphasis on undergraduate academic marks and LSAT scores. In my view these two considerations alone fall far short of what we, the legal profession, should consider when we embark upon the incredibly important task of deciding who will comprise our future legal profession and who will be ultimately responsible for the quality of our Canadian justice.

In my view, the Law Societies of the respective provinces of Canada in delegating to the individual Faculties of Law within their provinces the duty of selecting candidates for admission to Law School have not lived up to their responsibility to the profession and to the public as a whole. I do not intend for today's purposes to deal with the historical developments which led to the present state of affairs. However, at the present time, certainly in the Province of Ontario, the responsibility of selecting the appropriate candidates for the study of law has been entirely delegated to the respective Faculties of Law within each province. In view of the importance which I attach to this phase of the legal education process, I firmly believe that the profession through its governing bodies should have a much greater input into this phase of legal education. That is not to say that the Law Schools do not have an important role to play in the selection process but, in my view, the responsibility is a collective one and should not be exercised unilaterally by the academic branch of the profession.

Whenever I am called upon to discuss the qualities which in my view are required for a well-rounded lawyer I am reminded of a letter addressed to a young student about to embark upon law as a career and who asked the noted American jurist, Mr. Justice Felix Frankfurter, for some advice. This is the message the judge sent to the young man:

> My Dear Paul:
>
> No one can be a truly competent lawyer unless he is a cultivated man. If I were you I would forget all about any technical preparation for the law. The best way to prepare for the law is to come to the study of the law as a well read person. Thus alone can one acquire the capacity to use the English Language on paper and in speech and with the habits of thinking which only a truly liberal education can give. No less important for a lawyer is the cultivation of the imaginative faculties by reading poetry, seeing great paintings in the original or in easily available reproductions, and listening to great music. Stock your mind with the deposit of much good reading, and widen and deepen your feelings by experiencing vicariously as much as possible the wonderful mysteries of the universe, and forget all about your future career.

I am sure Mr. Justice Frankfurter would shudder if he were to be made aware of the tremendous importance attached to LSAT scores and undergraduate academic grades by the admission committees of our Canadian Law Schools.

Although admissions policies of the various law schools in Canada vary slightly from faculty to faculty they are basically uniform throughout Canada. The policy as set out in the 1980 Calendar for the Faculty of Law at the University of Toronto is representative of the general policy throughout the Country. It is as follows:

> The Basic Admissions policy of the faculty is to choose those applicants whom the admissions committee judges are likely to complete its program with the greatest intellectual return.
>
> The Faculty believes that the qualities of mind and personality necessary to satisfy its requirements are:
>
> A. High intelligence;
> B. Sound judgment;
> C. Capacity for demanding intellectual effort;
> D. Capacity to engage in sophisticated legal reasoning;
> E. Understanding of and sensitivity to human interaction; and
> D. Motivation to engage in demanding intellectual effort and sophisticated legal reasoning and, ultimately, to achieve great intellectual return.

Although all of these qualities are undoubtedly important attributes for any lawyer I feel there are many other qualities which are of even greater importance to the practicing lawyer and to society as a whole. In my view qualities such as honesty, integrity, a sense of professional and public duty, dedication to the profession and a broadly based background of education and experience, including the ability to speak in public, are essential factors which are not at present being given adequate consideration by the admissions committees of our law schools.

The present system of evaluating candidates on the basis of undergraduate university marks and LSAT scores ignores what I consider to be the most important qualities which should be sought out in selecting future members of the legal profession. These qualities could never be measured under the present admission procedures and it is, therefore, my view that the current methods should be re-evaluated and drastically altered so as to ensure that the legal profession of the future is not comprised of narrowly based and monolithic types of individuals.

At the present time, I believe approximately one out of every four applicants is admitted to one of the law schools in the Province of Ontario. Since the Law Society requires all applicants to complete three years of legal education at an approved law school, it is clear that the faculties of law at the present time are controlling in a very real way the public's admission to the profession of law. As I indicated earlier this important function should not be the sole responsibility of the academic branch of the profession.

I am sure that all will agree that there is a common interest in terms of selecting candidates for the study of law. We are all concerned that we "pick the best people." However, the present method must be revised so that we do, in fact, ensure that the candidates selected for admission possess the necessary qualities and abilities that will enable them to best serve the interests of the Canadian Public. I am sure that none of the practicing lawyers here today would ever dream of hiring a junior lawyer to work with their firm without first interviewing the prospective applicant. In fact, I am confident that very few employees anywhere are hired on the basis of undergraduate marks and academic testing scores alone. However, in Ontario and elsewhere in Canada applicants to law schools are not given personal interviews. I don't imagine many members of the public would expect to be engaged for an important position on the strength of a curriculum vitae alone and I am equally certain that they would be surprised to learn that the future of the administration of justice in our country is being shaped on the strength of a few numbers or scores alone. I am sure the general public would be even more shocked to learn that one of the criteria upon which our law faculties places a great deal of emphasis is the LSAT test, a standardized American computer examination written over a period of three and one-half hours.

As I understand, the history of the introduction of the LSAT test into Canada it was initially introduced by law schools as a means to "tip the balance" between a number of otherwise equally qualified prospective candidates. It has, in recent years, taken on a much greater significance and, as I understand it, is now relied upon heavily by admissions committees of all law schools in Canada.

In the 1981-82 Law School Admission Services General Information Booklet the LSAT test is explained as follows:

> The LSAT is a standardized test designed to measure certain mental abilities important in the study of law and, thus, to aid law schools in assessing the academic promise of their applicants. The test covers a broad range of academic disciplines and is intended to give no advantage to candidates from a particular academic background. The questions yielding the LSAT score are designed to measure the ability to read, understand, and reason logically using a variety of verbal and quantitative material.

As you can see, the test does not purport to measure most of the important qualities required of a practising lawyer. I feel if the legal profession in Canada is to continue to rely on this American computer examination, then we must conduct tests in Canada to determine the degree, if any, it successfully predicts candidates who will ultimately prove to be valuable members of the legal profession. Since very few, if any, students with low LSAT scores are admitted to law schools there is really no way of testing whether these candidates would ultimately prove to be more or less successful as practicing lawyers than the candidates admitted who received higher scores. In addition, the very definition indicates that the test does not predict the candidate's ability to ultimately practice law and serve the public.

In the above-mentioned LSAT information booklet the validity of the test is commented upon as follows:

> Over the years, the vast majority of law schools have participated in studies conducted by ETS (Educational Testing Services) that compared students' LSAT scores with their first year grades in Law School. While the correlations between test scores and grades are not perfect, these studies show that LSAT scores help to predict which students will do well in law school. Moreover, a combination of students' scores and undergraduate average gives a better prediction than either alone. ... The LSAT was not designed for, nor is it intended to be used, to predict success in the practice of law. No study purporting to show a correlation between LSAT scores and success in the practice of law is known to LSAC, LSAS or ETS. (Emphasis added)

It is clear, therefore, that the LSAT test cannot be relied upon as an effective tool to predict law school candidates' ultimate success in the practice of law. Admittedly, an important factor to consider before a student is admitted to law school is whether he or she has the academic ability to complete successfully the three year academic program at law school. However, surely the more important question that should be determined is whether the prospective law student will ultimately prove to be a competent and dedicated legal practitioner.

What worries me about a test such as the LSAT examination is the possibility that many talented young people are being excluded from the legal profession on the strength of this computer test who would ultimately prove to be excellent lawyers and might make great contributions to the legal profession in Canada. I have often wondered what results would be obtained if all of the benchers of the Law Society of Upper Canada were to write the LSAT test. I hazard to guess that a large percentage of us would receive scores below the cut-off point for admission to law school. One wonders how many potentially great advocates are being excluded from our profession simply because they did not score well on this American Computer Examination.

Undoubtedly, with the ever increasing numbers of applicants to law schools, the practical problems involved in selecting those who will be admitted are great. In my view, simply because there are practical problems associated with instituting a different procedure, this should not dissuade our profession from attempting to develop a better method to select our future laywers. Too often we hear those who would opt for more streamlined, efficient procedures complain that to do otherwise would place too heavy a burden on our judicial system.

There is no doubt that the system of trial by jury is a cumbersome and inefficient procedure, and there are those who would argue in the interests of efficiency that the system should therefore be abolished. This is a suggestion to which I am, of course, vehemently opposed. Lord Devlin mentioned that the possibility of enforcing the criminal law by a procedure requiring the unanimous verdict of twelve judges ought to be very unlikely. He even said, speaking in retrospect, that its invention by a lawgiver was inconceivable. He had in mind the process of selection of the jury a group of lay people without previous experience in weighing evidence and without previous knowledge of the law or legal principles. He thought, too, of how intricate some of the problems are that we are called upon to adjudicate, even over trials that are of very long duration and involving, as he said, "Piles of documents." The only law they know is what the judge says in his charge at the end of the trial and yet the system works.

The Right Honourable John Diefenbaker once said:

> Assembly-line justice is a contradiction in terms. Those who would place a premium on efficiency in the courts unwittingly open the doors to dictatorship.

In my view, to approach the selection of the legal profession of the future as if it were an assembly-line is a grave mistake. This quest for efficiency, in my view, attaches far too little importance to this onerous responsibility.

There is no doubt that to replace the present law school admission criteria would result in a more cumbersome and less efficient procedure. However, if it would result in a superior level of legal services to the public then it should be pursued at all costs. I intend this afternoon to deal with some possible ways in which the present system of selection might be improved with a view to raising the level of competence of the Bar. However, I would now like to touch on a few of the other concerns I have as a practicing lawyer in relation to the general competence of the profession as a whole.

It is my view that the present legal education given to law students should place more emphasis on many of the practical aspects of the practice of law.It is important that young lawyers receive a good basic academic education in the law, however, in my view there are areas that ultimately relate to the competence of the bar which should receive more attention in law school than they presently do. When I talk of the practical aspects of law, I have in mind greater concentration in areas such as moot courts and mock trials, tours of the courts and observation of actual trials and appeals and greater training in advocacy, ethics and professional responsibility.

A great deal could be gained by a much closer working relationship between the individual law faculties and the local bars so that students could be given the opportunity to spend time with practitioners,both in the courts and in their respective law offices, so as to gain insight into how the practice of law is actually carried out. Exposure to the actual practice of law would, in my view, prove to be of great value to law students even at this early stage of their careers. Just as medical students are exposed to patients in our various teaching hospitals, I believe law students should be given much greater exposure to the day to day work of practicing lawyers in the profession.

I have been most impressed with a program carried out by the Faculty of Law at York University in Toronto whereby students who are interested in criminal law can enroll in a program of intensive criminal law in their second or third year of law school. Under this program the students are assigned to a senior criminal lawyer, either for the prosecution or the defence. The students work with the lawyer to whom they are assigned for a period of approximately eight weeks during which time they assist in the preparation of cases by interviewing clients and witnesses, preparing memoranda of law and attending court with the lawyer. I believe that programs such as this should be encouraged in our law schools and should be expanded into areas other than criminal law so that students can gain greater exposure to what the practice of law is all about.

It is obvious that programs such as I suggest can only be accomplished if there is a good working relationship between the faculties of the various law schools and the local practicing bars. I feel that, as members of the profession, we have a duty to strive to establish a closer working relationship with our law faculties so as to ensure that our law students receive greater exposure to the practical problems associated with the practice of law.

In my view the area that should receive greater emphasis in the law school curriculum is advocacy before the courts and the fundamentals of legal ethics. These are two extremely important attributes of any practicing lawyer and I feel that the law schools today should devote more attention to training future members of the profession in these areas. Advocacy, of course, is the art of persuasion. When I addressed the faculty of law here at Dalhousie in 1979 on the "Art of Advocacy" I quoted from Leo Page's book First Steps in Advocacy. In that book Sir Geoffrey Lawrence said:

> Advocacy is one of the oldest of the arts. It is the art of persuasion, the art of communicating thought in a way which will win acceptance in the minds of the hearer. From ancient times, its exercise has guided human conduct and relationships often to a decisive extent. The great orators of classical antiquity were all advocates of their causes. The canons of the art which they established and the infinite variations which the genius of later generations of advocates has added to these canons will continue to provide a study of perennial fascination.

In my view advocacy is imperfect and ineffective if it is without courtesy. Courtesy to the court, to the public, to the witnesses you will examine as your own witnesses or cross-examine as your opponent's witnesses and, above all, to your colleagues at the bar. That is what Chief Justice Burger had in mind when he said "manners and decorum, especially in a courtroom, are the indispensible lubricant to the inherently contentious adversary process."

Courtesy and good manners should be stressed at the law school phase of the legal education process. Law students should be made aware that they will be expected to conduct themselves with courtesy and politeness in all their dealings at the bar. As I said when I spoke here in 1979 the most courteous counsel I ever met, indeed the most courteous human being I ever met, was John Cartwright, our former Chief Justice. I never heard him speak with discourtesy to, or about, anyone. Cardinal Newman once said that it was almost the definition of a gentleman to say that he is one who never inflicts pain. Shakespeare said "we are gentlemen that neither in our hearts nor outward eyes envy the great nor do the low despise."

Sir Malcolm Hilbery said:

> Nothing is so ingratiating as good manners. They convey the subtlest flattery for they express a natural inclination to consider the other person. It follows that they disarm antagonism and enlist sympathy. Bad manners are the mark of a bad advocate.

It is my belief, therefore, that to ensure the level of competence of our future advocates in Canada, more attention should be paid by our legal educators to such things as courtroom manners and courtesy as these qualities will have an undeniable bearing on the quality of justice that will be administered in our country in the future. Needless to say that if these important attributes are ignored in the legal education process the quality of advocacy in our courts and tribunals will decline as will our quality of justice.

Another recent development within our profession that has caused me a great deal of concern is the apparent mistrust which has built up between the crown and the defence in criminal cases. In my opinion the present relationship which exists between crown and defence counsel in many criminal cases is a result of the large number of younger, less experienced lawyers who are practicing in the criminal courts both on behalf of the prosecution and the defence.

We, as members of the legal profession, have a duty to ensure that young lawyers, during law school and their early years at the bar, have instilled in them the traditional and fundamental concepts of the role of the crown and the defence in criminal cases. In my experience many of the younger members of the bar have lost sight of these traditional roles, and consequently, we have begun to witness a decline in the quality of advocacy being practiced in our criminal courts.

It has always been my understanding of the role of the crown prosecutor that it is not his duty to secure a conviction, but rather that he is to fairly put forward the case for the prosecution.

As the late Henry Bull, Q.C., the Former Crown Attorney for the City of Toronto stated:

> The Crown Attorney is not a law enforcement officer; that is a policeman's function. He is not a gang buster, nor is he bent on ferreting out the law breaker and bringing him to the bar of justice. ... A criminal prosecution in our law is not a contest between individuals, nor is it a contest between the crown endeavouring to obtain a conviction and the accused endeavouring to be acquitted.
>
> The position of the crown attorney is not that of ordinary counsel in a civil case; he is acting in a quasi judicial capacity or as a Minister of Justice and ought to regard himself as part of the court rather than as an advocate. He is not to struggle for a conviction nor be betrayed by feelings of professional rivalry to regard the question at issue as one of professional superiority and a contest of skill and pre-eminence.
>
> He is present in court to present the case for the crown and has a discretion to do so as he sees fit. This discretion must be exercised with a feeling of responsibility to assist the judge in fairly putting the case before the jury ... fairness, moderation and dignity should characterize his conduct throughout. He is engaged in an investigation which should be conducted without feeling or animus on the part of the prosecution with a single view of determining the truth.

Mr. Bull's concept of the duty of the prosecution received approval in the often quoted but sometimes ignored judgment of the Supreme Court of Canada in the case of Boucher v. The Queen [1955] S.C.R. 16, in which Mr. Justice Rand said the following:

> It cannot be overemphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the crown considers to be credible evidence relevant to

> what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented; it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty that which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of dignity.

I recently participated in the Canadian Bar Association's continuing legal education institute in Toronto. A younger member of the bar who occupies a senior position with the crown law office of the Ministry of the Attorney General in Ontario participated in a panel on trial tactics. He was asked what his position would be if counsel for an accused requested that he consent to a re-election by the accused to be tried before a provincial court judge conducting a preliminary inquiry. In responding to the question he stated that it would depend "if he felt he was winning or losing the case." I was dismayed that such a senior member of the Attorney General's prosecutorial branch expressed such sentiments. In my view he completely ignored the fundamental duty of counsel conducting a prosecution on behalf of the crown.

In my experience this is the type of attitude we are experiencing more and more frequently and is partly a result of the modern, legal education curriculum which, in my view, does not attach sufficient importance to fundamental concepts of advocacy such as those outlined in the Supreme Court of Canada's decision in the Boucher case.

The problem is not, in my experience, confined to lawyers acting on behalf of the prosecution. Problems have arisen recently which involve lawyers acting on behalf of the defence who, in my opinion, misperceive their function in society.

Mr. George D. Finlayson, Q.C., the former treasurer of the Law Society of Upper Canada, addressed the twenty-first bar admission course in 1980 on the subject of "The Lawyer as a Professional." He stated:

> I am very much afraid that lawyers forget that they are much more than skilled technicians. We are not mere word merchants, nor are we simply holding ourselves out to the public as persons who can serve with special skills and judgment in an area in which prospective clients are unable to serve themselves.
>
> We represent ourselves as having, not only a knowledge of the law, but more important, the skill and judgment necessary to advise an individual member of the public as to what his position is before the law, and what realistic expectations he can have in the pursuit of his own private interest with relation to that law.

Mr. Finlayson discussed the role of the lawyer as a social advocate and admonished lawyers from using clients as a means of promoting a cause. He said:

> These lawyers, and I will say most of them Bona Fide, believe that it is a proper function of counsel to espouse a cause and to attempt to bring about political or social reforms through their representation of such cause. Neither I nor anybody else can have any objection to the conduct of a lawyer who is prepared to make the sacrifice of his own professional time to put forward his views on behalf of a group or an idea or a social issue ... but it is one thing to speak out in favour of a cause, it is another to use clients as a means of promoting that cause. Here the client is not being represented, here the client is the victim of what the lawyer considers to be a matter that is worth fighting for. These lawyers often seek out clients who appear to be examples that justify the cause, although they do not necessarily do so.

Mr. Finlayson went on to say:

> I have in mind the situation where counsel, having barely met his client, announces to the media that this is a case of police brutality, or racism, or the like. A counsel who persistently puts forward those defences, is obviously not representing the client at all. He has given no thought as to whether that defence would be effective, even if it was applicable, and accordingly, where his cause may prosper, that of his client will surely flounder.

The modern trends that we are witnessing in the legal profession make it essential that the basic fundamental concepts upon which our profession has been based for centuries be instilled in our young lawyers at the earliest stage. It is therefore my belief that the level of competence which the Canadian public can expect to receive from the legal profession is directly related to the types of individuals admitted to our law schools and to the way in which they are trained during their course of study there. The former treasurer of the Law Society of Upper Canada, Mr. Finlayson, referred to the importance of the legal training our young lawyers receive in his annual report of 1979. He said:

> The composition of the profession has undergone a remarkable change in recent years. It has increased in size by about 10% each year for the past ten years with the result that approximately 40% of those practising in Ontario today were called to the bar within the past decade. One of the consequences of this change has been that many students now serving under articles are serving quite junior members of the Bar and have no ready access to the counsel and advice of senior practitioners with many years of practical experience. Another result has been that increasing numbers of new graduates are opening firms with other new graduates or setting up practises on their own. At the same time, the law itself has been changing and developing at an unprecedented rate so that it has become more and more difficult for members to keep abreast of changes in law and practice even in relatively

> narrow fields. It has become increasingly important therefore that those seeking admission to the bar have received a legal education which fits them for present day conditions of practice, that the means of keeping practitioners up-to-date are improved and the sources of mistakes in day-to-day practice are identified and, so far as possible, effective remedies are found to prevent their reoccurrence.

I do not apologize for criticisms I felt it necessary to make of certain aspects of our present legal training system. I hope during the session this afternoon to touch on a few of the more positive and innovative developments that are taking place within the profession which I hope will serve to improve upon the legal services being offered to the public. However, it is my firm belief that as a self-governing profession if we do not strive to police ourselves we might someday in the future lose the privilege of self-government which, I fear, is sometimes taken for granted by our profession. As former Chief Justice McRuer stated in his report of the Ontario Royal Commission inquiry into civil rights:

> The granting of self-government is a delegation of legislative and judicial functions and can only be justified as a safeguard to the public interest. The power is not conferred to give or reinforce a professional or occupational status. The relevant question is not 'do the practitioners of the occupation desire the power of self-government' but 'is self-government necessary for the protection of the public'.

In closing, I refer to Lord Birkett's description of an advocate in his book, The Six Great Advocates. It was a description that all of us in the legal profession should bear in mind when we consider the way in which our future legal practitioners will be selected and trained so as to ensure a high level of professional competence in the future:

> For more than forty years I have been actively engaged in the practice of the law, either as counsel or as a judge, and during that time I've seen, I suppose every kind of case, in almost every kind of court, and almost every kind of advocate and judge. I am quite sure that when men and women are brought into the civil or criminal courts for whatever reason, they should be able to turn for assistance at what may be a critical moment of their lives to a trained body of advocates, independent and fearless, who are pledged to see that they are protected against injustice and that their rights are not wrongly invaded from any quarter. The vocation of the advocate calls for the nicest sense of honour and for complete devotion to the ideals of justice and I believe a lofty and necessary calling which is vital for the maintenance of that way of life which we have come to believe.

MR. PETER GREEN
KITZ, MATHESON, GREEN AND MACISAAC

Practitioners have good cause to be concerned about both the actual and the perceived state of the profession. One has only to read any number of popular magazine articles to gain an idea of the public's negative perception of the legal profession.

Professor Jacques Barzun, in an article in Harper's in October, 1978, entitled "The Professions Under Siege" stated:

> The parallel grievances about lawyers include, besides exorbitant fees, total disregard of the interests of society, mutual protection through the bar associations' connivance at error and fraud, the calculated deception of the public through the use of purposely mystifying language.

In the May 11, 1981, issue of U.S. News & World Report, an article entitled "Why Lawyers are in the Doghouse," starts off by saying:

> ... America's lawyers are under indictment from the public.
>
> Charge No. 1: Dishonesty. A growing number of lawyers are accused of defrauding clients, representing conflicting interests, breaking securities laws or other misdeeds that show either ignorance of ethics or contempt for them.
>
> Charge No. 2: Incompetence. More and more practitioners are accused of costly mistakes such as failing to file suits before deadlines, not telling clients about the progress of their cases and making inexcusable errors during trials.
>
> Charge No. 3: Greed. Attorneys are accused of collecting fees that often seem to go far beyond what is justified by the work involved...

When Ralph Nader is lined up with the big corporations and holds seminars to counsel companies on ways to reduce outside legal fees, and when you recognize the widespread concern over the unavailability of legal services to middle income families because of high legal fees, you know that the practicing legal profession has problems.

State of the Profession:

What is the actual state of the practicing legal profession?

The answer is that there is some good news and some bad news.

The good news is that a decided majority of practitioners are to hold practicing certificates. That is, they are either competent to provide legal services themselves or they know their limits and know when a matter should be referred to a specialist within or outside the profession. Those practitioners are qualified and in fact provide their clients with satis-

There are a number of practitioners who clearly are not competent. They lack analytical legal skills and, thus, they cannot be counted on to analyze the client's legal problems and render some advice or reach a satisfactory conclusion in the handling of matters on behalf of clients.

Those who are not competent may lack common or "street" sense and the ability to exercise judgment in the handling of client's affairs. They may lack organizational skills to properly administer a law practice and administer the delivery of legal services to or on behalf of clients.

A number of practicing lawyers lack grounding in the ethics of professional legal practice and thus lack a sound knowledge of such matters as the treatment of clients, relations with other practitioners, and rules and decision-making respecting handling of such matters as conflicts of interest.

A small minority of practitioners are incompetent or dishonest or both. They may be incompetent before they become dishonest but, nevertheless, the result is the same. It is not necessary for me to mention the actual results of permitting such persons to engage in the practice of law.

What are my concerns?

I am only one practitioner, sitting here with others who have either taught or practiced or both, and one might ask what right I have to comment on such lofty subjects as professional competence and the law. I do not speak for the organized Bar in Nova Scotia, but I have been involved in activities of the Bar in the areas of qualifications and professional competence. I comment on the "practitioner's concerns" from that perspective and from having thought about the subject for a number of years.

My first concern is that the legal profession does not go the way of dinosaurs. I agree with Sam Smith, the past president of the Florida Bar, in the Miami Panel entitled "The Duty to Deliver Competent Counsel," reported at page 72 of the conference materials, when he says:

> Ten years from now, if the profession does not change and start delivering competent legal services, none of the members of this panel, and none of you in this room, will recognize the practice of law as people before us knew it.

The organized Bar and members of the practicing profession will be required to adapt to change to a greater extent than in the past. Indeed, to quote Leonard Janofsky, a former ABA president, "Change in the profession is occurring so rapidly that we cannot afford merely to react to issues as they emerge. We must, rather, anticipate their emergence." The change that is referred to includes not only change in the social and political environment, but also in the role of in the lawyer, the methods of delivering legal services and fundamental factors related to the economics of law practice.

Second, my concern is that we have practitioners who have an enlightened approach to social and public policy issues. It is not sufficient for lawyers to bury themselves in their practices and delivery of services to clients, to the exclusion of being informed and participating in debate on current social and public policy matters.

This concern extends to the requirement that we have enlightened tough-minded leadership in the organized Bar. I have already cited the public perception that bar societies exist for the mutual protection of practitioners who have a monopoly in the delivery of legal services. We must dispel that perception and administer the profession in the interests of the public and not the self-serving interests of the practicing Bar.

Third, we must have practitioners who are competent to analyze clients' problems and deliver the required legal services effectively. That includes:

a. the application of sound theoretical legal analysis;
b. the exercise of sound judgment and common sense;
c. expeditious methods for the delivery of legal services.

The public will no longer stand for the delivery of legal services being approached as a "cottage industry." We must have effective systems for the delivery of services and efficient office practices to ensure the delivery of services to clients on a cost-efficient basis;

d. ethical behaviour;
e. proper treatment of clients--that includes communication with clients and proper treatment of clients respecting fees. The problem with the fee-setting process on the part of lawyers is that most have no comprehension of the economics of operating a law practice; they do not keep adequate time records; and they have not had instruction in proper fee-setting methods. Thus, lawyers, lacking the necessary information and training to engage in the fee-setting process, exhibit inconsistency that inevitably leads to gouging. Indeed, it is my view that the perception that legal fees are high is not held by clients who regularly use lawyers to provide services, but rather as a result of the many stories about exorbitant fees in particular cases.

Fourth, as a practitioner I am concerned that candidates for admission to the Bar be qualified to commence practice. I agree with Roger Cramton that, in the delivery of legal services by the practicing profession, reliability is what is important. That gives the entrée and, hopefully, the justification to comment on pre-admission training.

In my view effective training must be done in the law schools. Articling is a period of internship in law offices that can be an important and integral part of the training process. But, in terms of training persons who are qualified to practice law, articling is secondary to the training that can be obtained at law school. Bar admission courses, as we know them in most provinces, have serious handicaps as vehicles for teaching practical skills. In a few words, the training is too compacted, too tedious, and simply cannot impart a sufficient range of practical skills to satisfy the pre-admission requirement.

In my view the solution is a blend of teaching theory and practice-related skills in law school. It is not "anti-intellectual" to seek the proper blend of theory and practice subjects in order to produce competent and qualified candidates for admission to the Bar.

Practice-related teaching will, indeed, add meaning to the theory and substance of the law established through cases and statutes.

Sam Smith, in the panel referred to in the materials, puts the matter rather well when he says:

> What I have said does not mean that I would do away with the basic learning that you get in law schools by the analytical technique ... I could not draft a document now without the basic understanding of contracts that I obtained by the case book method. I was really disappointed, however, that I left these halls and no one ever made me draft a contract.

Professor Kelso, participating in the same panel, stated "I think that the solution is in the clinical programs in the legal education process, and if the Bar and all of the interested constituents get together, we can solve the problem."

I share that view. I would not take away any amount of the teaching and reading of the theory, substance, and evolution of legal principles through the analysis of cases. I would, however, place more emphasis on the practical application of legal principles and the elements of delivery of legal services.

Yesterday, Murray Fraser called on the law school to join with the profession to strengthen the role of the university. There is a need for an alliance of law teachers and practitioners in order to introduce elements of practical application to most law courses. The first retort will be that there is insufficient time in the three year law school program for such an approach. Well, just like the song about the hole in the bucket said "fix it," I suggest that if the present time frame is not sufficient, then "extend it." Without venturing further into the solution, I repeat Professor Kelso's words "if the Bar and all interested constituents get together, we can solve the problem."

MR. BRIAN FLEMMING, Q.C.
STEWART, MACKEEN AND COVERT

In my cynical days when I was a law student here, I used to say that if Sir John A. MacDonald were to return to earth it would only be necessary to give him a two week refresher course before allowing him to set up his law practice in Kingston once again--meaning that the law was moving very slowly and that things did not change much. However, I think that in the last 20 to 30 years one of the major developments has been that legislative time has diminished more than ever. Indeed, modern communication and ease of travel has diminished everybody's time to the point that law professors must do the sorts of things that Arthur Maloney has criticized this morning.On top of this, practitioners are frequently too busy to give the kind of training to law students that they used to give. In the legislative sphere, the diminishing time has meant that more and more of our statutes are enabling statutes and, thus, we are living in a regime of an increasingly complex regulatory system. This will continue despite the deregulation movement which is at present gaining in popularity.

The result of this is that, more than ever, the relationship between law and policy is something that law students and law practitioners have to be very much aware of. It is not enough to know your cases thoroughly; it is not enough to know your statutes. You must know the whole regulatory [illegible] and network which has been established by government at all levels [illegible] be very sensitive to the politics in the small "p" sense of the word. Let me give you a few examples which I have encountered in my practicing career.

The first one occurred a number of years ago and demonstrates one aspect of this problem. Once upon a time, I represented a group called the Denturists. They were seeking legal recognition about 10 years ago in this province and had trooped around to a number of law practitioners in the city asking, "What can we do?". They were being charged, they were being tried, they were being fined and they were at the brink of being put in jail. Everywhere they went nothing seemed to happen except that they paid large legal fees.

When they arrived on my doorstep, I advised them that the only solution was to change the law because, in my view, the legal system had not caught up with their technology and what they wanted to do. So, with a great deal of effort and many months of work, we successfully changed the law. It took a lot of time and a lot of effort on their part as well as mine. In the end, however, we got legislation which was the most advanced in Canada at that time. The point is that virtually all practitioners had told them that they were breaking the law and that they would be delighted to go to Court and present a plea in mitigation of the sentence but nobody said, "Why don't you change the law?".

Another case relates to the Foreign Investment Review legislation. Within the last two weeks I have run into a situation where a major multi--million dollar closing was about to occur in the city. I was not engaged as a solicitor by any of the parties but some people whom I knew were. It turned out that the Foreign Investment Review legislation had not been considered as something which had to be dealt with even though one of the people involved in the acquisition of a company in Nova Scotia was an American. When it was gently suggested to a fellow lawyer that maybe he ought to think about FIRA, he said, "Oh well, we'll worry about that later--if they catch us." I advised him that they could do terrible things to him if they caught him, not to speak of his client. But somehow he thought it could be worked out; somehow he thought the political-cum-legal system could handle it. I think law firms, as opposed to lawyers individually, have a major role to play in keeping up legal education in areas such as this. People must be kept in tune and sensitive to matters like foreign investment review legislation.

Another area in this province where I think that law students being licensed to deal with the public must be very sensitive, is in the area of fisheries. In Fisheries Law, there has been a tremendous growth in the generalized kind of statutes which I have referred to earlier and the consequent creation of a large regulatory system. Anybody practicing in Shelburne, Sydney or Digby must be profoundly aware of the relationship between the law and policy or else they are not going to be able to serve the people who come to them for legal assistance.

Law schools are still oriented far too much in my view towards a case law system. I think that first year is still a terribly debilitating event, not because it is not intellectually exciting and not because it is not interesting work, but because it gives you a misplaced mind-set. In later years in law school and in law practice, you have to break out of the case world and realize that facts are not deposited before you in this predigested form. You have to assemble them and massage them into place yourself. The second and third year in law school does not do much better in providing you with the equipment to deal with such problems in practice.

Very closely related to the relationship of law and policy is the relationship of public to private law. Arthur Maloney will well remember the Bill of Rights of 1960 and the way in which that law, for reasons which I do not think were terribly fair, sank from view because the Bench and Bar were not sensitive to public law techniques and how they related to existing law. If at the end of the summer or at some point in the near future we wind up with an entrenched Bill of Rights, then there is going to be an even greater need for this relationship between public and private law to be perceived by the profession, by those of us who are teaching the profession and by those of us who are on the Bench "correcting" the profession's "examination papers" from time to time.

Here is another straw in the wind: I have an article here before me from a recent issue of Business Week and it starts with a marvelous story about a business executive being asked how his company was doing. He said, "Fine. Seven times legal fees." Ralph Nader tells that story and is giving a seminar at Stanford University this summer on the subject of excessive corporate legal fees. Mr. Nader's consumerism has now carried him over into the area of being worried about the high fees which large law firms in the United States are apparently socking to their big clients. Something must be out of whack if that is a problem which Mr. Nader is worried about.

Speaking of nervous laughter, a story which lawyers laugh at very nervously is the old chestnut about the man who went to Heaven and arrived at St. Peter's Gate. St. Peter said, "My, you are an old man, how old are you?". The man said, "Well I am 142 and I must be one of the oldest people to come in here." St. Peter said, "Well, yes you certainly are old but where are you from?". The man said, "I am from Halifax". St. Peter said, "Gee, isn't that funny, a few weeks ago we had someone from Halifax who was much older than you are." The man said, "Look, I had my marbles to the end; I read the Chronicle-Herald every day and I know that there was nobody in Nova Scotia who was older than I was." St. Peter said, "That's what we thought when this fellow arrived because he looked much younger than you. He was a lawyer practicing in Halifax and, as you know, lawyers keep their time in a docket book. He brought his books with him and, sure enough, when we added them up he turned out to be 275." As economic pressures on our profession increase, whether in Toronto, Vancouver or Halifax, the large law firm is under increasing pressure to pay higher overheads, higher incomes to all people in the firm and, therefore, it must work harder. And the larger law firm does not necessarily create a safety net for the young practitioner in this climate. The desire for more income is just as prevalent among the profession as the desire in law school to have a more efficient system of processing students and thereby allowing the LSAT sometimes to have greater importance than it ought to have. We, therefore, have the duty to step back and say, are we doing this right? Are we being competent and creating competence when we do not structure our firms and our lives and our practices in such a way as to ensure that the competence is there?

In larger firms, regrettably, one must put in place more formal stuctures to ensure the competence of all practitioners. It is not enough any more to leave this to chance or to allow competence to develop purely through a system of osmosis. The fact that we are here today in an open forum, discussing our own competence and that of our fellow practitioners, law schools and the profession generally, is a giant step and something which can only do good. I am delighted to have had an opportunity to be here today and congratulate Professor Leon Trakman on having had the initiative to organize the conference. Thank you.

DISCUSSION

Professor Kirby: I rise in the defence of the current admissions procedures and policies in most law schools. This is in appreciation of Mr. Maloney's thoughtful statement. He is to be respected for challenging a predominantly law faculty audience here. I am down from Tennessee and I speak from experience with admissions for a seven to eight year period at two different state university law schools. And I speak with certainty that Mr. Maloney is inviting us to enter a cauldron of pressure on the admissions process--inviting political pressure, special influence, trustee's pressure, football coach privilege--which would make the admissions process a politicized thing and the worst introduction of a student to the rule of law and to concepts of due process. The LSAT people agree with you. No one should rely upon the LSAT alone, and we do not. We do rely on a combination of the LSAT and grade point average with some discretion at the lower end of the applicant pool. There the intangible factors that you mentioned may be considered. But your view of grades is contrary to my experience. Employers who have a choice generally hire from the top of the class. Judges hiring clerks certainly hire from the top of the class. Top law firms hire from the top of the class. And I have heard lawyers say there is a correlation between success in law school and success in law practice. There is certainly a correlation between success in the LSAT and success in the law school. As for interviews, interviewing a handful of applicants for an associate position involving an intimate career-long relationship, is very different from interviewing hundreds of applicants for a three year law school program. The fact is, that, and I say this from reviewing hundreds of application records over the years, persons with high grades and high test scores are just as likely to have the extra-curricular activities and the personal qualities that you described in students who may have the lower grades. It is an umpiring of competition. Why not give it to those who have thus far succeeded best in the competition for the academic prize?

Finally, I say we do this over the years with experience and without being unaware of the success and failures of our graduates in the practice of law. Here I think we should perhaps return to Mr. Flemming's concept of jurisdiction. In every state, I think, in the United States, this is ultimately under the control of the court--the supreme court of the state. The courts seem to be fairly well satisfied with the totality of the results of our law school admissions procedures and our bar examination process. Thank you.

Professor Maloney: I knew my views would not be popular in this particular audience. I did not come here unaware of the unpopularity of my stance. But that never deterred from doing anything I did in the past in my life, so I did not allow it to deter me this morning. As Lord Devlin said in defence of the jury system, it was inconceivable that anyone would have thought it could be advocated as a means of administering justice. I guess that what you say of me is the same: it is unconceivable that anyone could advocate what I have advocated as the approach to the selection of law student material. But the system, the jury system, that Lord Devlin conceded was probably inconceivable, has worked very, very well as you are probably willing to admit. I rather think that if we give a new look to this whole problem of admission to law school we are going to end up with something an awful lot better over the long term and I would like to see it tried. I think it could be done. Just because it seems to be difficult to do is no reason for not doing it. I am not so much concerned about who we are letting practice law. What frightens me is who we are keeping out, and I do not like that, and I do not think that lawyers should like that. I think they should be dissatisfied about it.

Comment: I would like to direct my comments also to Mr. Maloney. They relate, with respect, to the criteria which he would apply to people going to law school. It seems to me that this pre-supposes that everyone going to law school and everyone who should go to law school, is going to be a practicing lawyer. I am not sure that that position is totally accurate. If you accept the notion that anyone who is likely to succeed in law school is entitled to a legal education then would not his selection criteria be better imposed at the bar admission level?

Mr. Maloney: I did not mean to restrict my remarks to the law students whose ambition was to practice advocacy in the civil or criminal courts. The thrust of my remarks, I think, can be translated into the other area of practice, into corporate law, solicitors practice, and that sort of thing. I did not mean to confine my criticism of the system to the limited area of skill in advocacy. I was thinking of a general rounded practitioner of law in whatever field he or she may be called upon to serve or may want to serve.

Professor Fraser: Since I am no longer a dean and carry only my personal brief, I do not feel threatened; and I would like to make a few comments.

The first is that I do not think the academic community should or does feel threatened by enquiries into the adequacies of law school teaching. I think that we have grown and matured as a profession and are confident enough to deal with these queries sensibly.

The next point is that I am personally very proud of the graduates of the past fifteen years. I think they have already made substantial contributions to our profession across the country and they will continue to do so. I am proud of their professional qualities. I am proud of them as individuals and I regard it as a privilege to teach in a university law school. I am still looking for the link between the quality or lack of quality of our graduates and incompetence. I have yet to hear anything that establishes a causal link between the two.

The next point is that we are in a university community. We are publicly funded. We are based, I hope, upon the principle of access to all who have the academic potential to complete the program--whether it be in classics, or in law, or in physics or literature. Is it, and should it be, a value-free process? I am not aware of tests for admission to the other major programs in Arts and Science but I know--and I think Mr. Maloney is getting at this--that there is a question about the responsibility of university faculties who are engaged in professional programs with respect to additional qualification that we should look for in those that we admit. What are our responsibilities here? To what extent do they exist? How might they be discharged adequately in the university context and in the context of professional programs? I am not totally sure of my own answers to those questions. I do not know whether this is a major responsibility of the profession, for as one speaker mentioned, admission to law school does not mean admission to the practice of law.

Now, let me give you a little bit of our experiences at Victoria. Numbers: we have a little school there but we have eight hundred applicants for one hundred places. This raises a problem as far as interviewing goes. It is an obvious risk here. I might say, as an aside, that in sixteen years of experience with admissions in the law schools and universities, I have noticed the tremendous interest of lawyers in individual cases of admissions, particularly when they were sons or daughters or members of families of clients. No other group has lobbied so hard as lawyers in the admissions process. Now you [Mr. Maloney] mentioned the risk of narrowly based and monolithic persons in law schools but I am sure you did not mean to imply that the graduates who are coming out of law schools today are narrowly based and monolithic. They are not. The average age in our first year law class is twenty-eight. They have a rich background of worldly experience which makes it very exciting to teach them in law school. As examples, we have architects, we have Ph.D.s, we have directors of corrections, social workers, teachers, native peoples, mature students, commercial fishermen etc. Interestingly, ninety percent of them, at least at our schools, still have a Bachelor of Arts degree as a background. Their degrees range from Music to Classics, from History to English. They are much more interesting than my class was, than I was, and probably than I am.

The economic factors, Mr. Maloney, are important. Many of them are married. Many of them have families. Many of them are one-parent families and they have other obligations than sports and drama and the traditional values that one can subscribe to. Their financial costs are very heavy. They have difficulty getting summer jobs and many of them have to work part-time to put themselves through law schools. We have yet to fulfil our obligations to native people and people who have not had the advantage of full schooling to qualify in the normal way. There have been other experiences--I am sorry that there is no one here from Calgary. Calgary, I believe, has divided the entering class into thirds. They selected one third by interview, one third by a combination of marks and LSAT, and one third out of the hat. Now that may be worth a try because we are not sure about the tests that we are applying. How do you test for moral behaviour, honesty, integrity, ability and dramatic skill as far as entrance to law school is concerned? I look forward to the solution. I also look forward to seeing how these are reflected within the legal profession, as applied to the practicing barristers. I am not a great supporter of the LSAT. But it does seem to me to be a factor which, when combined with academic performance, is predictive of some success. I think twelve years ago we were involved in very serious discussions about trying to put together a Canadian LSAT equivalent, or a Canadian improvement of the LSAT. The Law Deans' Committee worked very hard at that. In the end, it was not financially feasible. It was going to cost millions of dollars. I look forward to the legal profession supporting an independent study of admission factors: admissions, criteria, predictive tests and so on. That would be helpful.

Finally, in British Columbia, it is the responsibility of the principal of the articling student that has been in close professional contact with the student for the year to say something to the bar about the integrity of the student and his or her fitness for the study of law. I wonder whether that obligation is being met, if Mr. Maloney is concerned about the qualifications of those who are admitted to the bar. I hope I have not exacerbated the debate; but I do feel that it is important for someone who no longer carry the dean's hat on his head, or in his hand, to try to put forward some of those factors. Thank you.

Professor Harris: Thank you for your comments Professor Fraser. I know we have other questions and I expect Mr. Maloney would like to respond to the last points made; but perhaps we can give him an opportunity this afternoon to do so. We are way over our time and we must bring the session to a conclusion. Perhaps it is better that we do so while the debate is alive, rather than when it is sputtering. On your behalf, I would like to extend thanks to our three speakers this morning for a very stimulating session.

PROFESSOR EDWIN HARRIS, Q.C.

I think, pursuing their own independent ways, our three panellists this morning have shown a remarkable degree of agreement on where the main areas of concern are. We see a strong emphasis placed upon pre-practice education and the role of the law schools in preparing for competent practice. We have seen a concern raised that the concept of competence should not be too narrowly construed, not simply as a matter technical ability to provide answers to legal questions, but reflecting a much broader viewpoint which gets into questions of attitudes and intellectual honesty, concern for public interest and public policy. As a result, we must be careful, if we accept the general thrust of what was said this morning, to give the concept of competence the breadth that it requires if we are going to be successful in improving the quality of legal services.

PROFESSIONAL COMPETENCE AND THE LAW

Sixth Session: Saturday, May 30, 1981

THE SOCIAL COSTS OF INCOMPETENCE

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> After I had cut off my hands and grown new ones, something
> my former hands had longed for came and asked to be rocked.
> After my plucked out eyes had withered and new ones grown,
> something my former eyes had wept for came asking to be pitied.[1]

The above quotation has been applied to lawyers and in particular to the process of legal education. It is a distressing thought for anyone who cares about the law and considers it a worthy profession. Must people sever hands that can rock and pluck out eyes that can pity in order to become a lawyer? Surely not, but there is more severing and plucking that takes place in our law schools and law offices than lawyers would care to admit.

Although most students enter law schools with a liberal-arts education, legal educators do not properly build upon this foundation. Indeed, we often feel it necessary to uproot the foundation and replace it with one designed to promote legal reasoning. After-dinner homilies about the well-rounded Renaissance lawyer aside, lawyers and law students are not encouraged to read broadly in the arts and the humanities. In fact, law students and young lawyers are inundated with legal reading which consumes not only their time, but also their desire and energy to read anything else.

In fairness, becoming expert or learned in any field entails a certain narrowing of perspective and loss of innocence. This loss of the sense of mystery is eloquently described in Mark Twain's famous account of the pilot learning to navigate the Mississippi River.[2] Mark Twain's own analogy is to the physician who views the flush in a woman's cheek not as a sign of physical beauty, but rather as a mask of some dreadful disease. James B. White in The Legal Imagination casts Mark Twain's words in a legal setting but asks rhetorically what is the loss.[3] Does a person lose the poet's sense of beauty and wonder or does one simply lose the view of the sentimentalist by learning to think in less childish ways?

What is the relevance of the above comments to the social costs of incompetence? Other speakers at this conference have emphasized the difficulty in defining legal incompetence. This panel must also grapple with the meaning of social costs and hence fall victim to a kind of semantic double jeopardy. I make no claim to really define either of these elusive concepts. Instead, the aims of this venture are rather modest. It is to a narrower slice of the topic that the introductory comments relate.

This paper will focus upon two major facets of lawyer's incompetence--the loss of humanism and the growth of anti-intellectualism. There will also be some consideration of the impact of these inadequacies upon the consumer of legal services.

The Importance of Humanism

It is not fashionable in legal circles to be identified as a humanist, if indeed there is such a distinctive category. Humanism is one of those umbrella concepts which admits as much rain as it repels. There may be no satisfactory definition of humanism. In more precise terms, I argue for a broader awareness of human values outside the discipline of law as well as within it. This broader awareness would produce a greater sensitivity to the human problems that people bring to law offices.

To even speak in these terms could be viewed as a regression to the naive optimism of the 1960's. I think not. Furthermore, there is no contradiction in promoting both a more humanistic approach to law and an intellectually more rigorous one.[4] The development of the intellect should enhance humanity and not the reverse.

Implicit in my selection of problems is the need to focus not upon substantive knowledge and practical skills but rather on attitudes. Professor Frankel, before donning his judicial robes, argued persuasively that the real problems of lawyer incompetence are attitudinal.[5] Lawyers are very rarely sued for lack of knowledge or technical proficiency. They are most frequently sued on matters of ethics or neglect such as missing limitation periods, failing to interview witnesses, poor research or fraud. Professor Frankel as he then was, reaches the alarming conclusion that in the United States, there are frequent assertions that the "lawyer as tradesman has been cheating the customer."[6] These are problems of ethics and attitudes, not skill deficiency. These same problems of procrastination, disorganization and irresponsible professional behaviour are reflected in less dramatic form in the Canadian negligence cases.[7]

Professor Neil Gold of the University of Victoria sees attitudes as an important part of professional competence.[8] He makes the following comment:

> A competent professional must be responsible, diligent, open-minded, considerate of others, committed to quality services and interested in the social, economic and human implications of his work. The well-rounded professional realizes that law operates within a complex social system. The competent and concerned legal professional is a person who sees law as connected with learning in the social sciences and the humanities. The narrow technician should give way to the sentient whole person, whose world views are dynamic.

This appears to be a call for humanism in the best sense of that term. The competent lawyer must be sensitive to the human tragedy which lies behind the distilled legal issues. Such sensitivity is much more likely if the lawyer approaches the problem with consideration, responsibility and open-mindedness. These are attitudes which should be fostered and nourished by the law schools, the Bar and the Bench.

On basic matters of ethics and integrity, one should be modest about the role of education. Professor Frankel again expresses this well.

> Let us by all means stress ethics and seek to uplift ourselves. But let us not build our hopes for the system on a breed of lawyers much better or much worse than mere human beings. If we limit our fantasies in this respect, we will not expect that

> better rules of warfare are apt to produce peace and co-operative crusades for justice.[10]

The concern about incompetent advocacy is typified by the remarks of Chief Justice Warren Burger of the American Supreme Court, in which he suggested that one third to one half of American trial lawyers are incompetent.[11] Not only do more recent studies indicate that the problems of incompetent advocacy have been over-stated;[12] but more importantly, basic attitudes and not lack of technical skills, are the genesis of incompetence. Teaching the arts of advocacy or negotiation may make lawyers more adept at playing the legal game, but it will not necessarily promote either professionalism or justice. The concern about advocacy skills is misguided and incomplete. Better technicians will not necessarily fashion a more humane and just legal machine.

The Need for Intellectual Rigour

No teacher of law, judge or lawyer should apologize for demanding high academic performance from law students and young lawyers. Indeed, apologies are owed when lower standards are accepted or encouraged. Being perfectly normal human beings, law students and young lawyers seek to avoid work, minimize intellectual pain and find the certainty of fixed rules. Learning anything involves both pain and pleasure and this should be demonstrated by word and example.

A lawyer need not attain the highest standards in order to be competent. However, given the status of the legal profession and the economic benefits of joining it, we have a duty to insist upon minimum standards of intellectual performance. More importantly, law schools and the practicing profession should encourage and promote self-motivated learning, continuing legal education and dedication to quality legal service. Such professionalism is a prerequisite of long term competence.

The broader evils of anti-intellectualism in the law schools have been well chronicled.[13] Furthermore, delay, poor work habits, inadequate preparation and insufficient effort are at the heart of most cases of lawyer negligence. Dispensing justice in a complex society demands increasing moral and intellectual rigour on the part of lawyers. If lawyers are unwilling to enforce high standards of performance, then they should be willing to surrender some of the privileges and benefits of a learned profession.

The Social Costs

There are readily apparent social costs to anti-intellectualism. Law schools may degenerate into trade schools where students are denied the academic challenge of mastering the discipline of law. Consumers of legal services may be confronted with a legal system that is more concerned with procedures and technicalities than a careful balancing of the scales of justice. Members of Bench and Bar will be bored by the routine of law rather than challenged by its intricacies and capacity for change.

However, the greatest social cost of anti-intellectualism is that it decreases the likelihood that the basic assumptions of our legal system will be questioned. To be effective, law must be vital and changing. Stagnation born of lazy thinking will poison not only the legal profession but the broader society as well.

The social costs of underplaying human values are less apparent but equally devastating. Returning to the questions posed by Mark Twain and James White, what is lost in the process of legal education? If lawyers can only view problems in legal terms devoid of human dimensions, a great deal is lost. If a lawyer's first reaction to a murder is a strategy of legal defences, he or she has lost a sense of priority. However, such losses are not inevitable. Nor does Mark Twain convince me that a doctor sees a woman's body in terms of potential disease.

The human side of lawyering is clearly underplayed by law teachers and practicing lawyers. There are few opportunities for law students to interview clients or improve their skills in relating to non-lawyers. Speaking to a distressed client in complex legal terms demonstrates a lack of sensitivity and consideration. Establishing good human relations with your client also pays immediate dividends in terms of information flow and client trust. Sensitivity and effective communication are a vital part of the competent lawyer's repertoire.

Lawyers need not have arms incapable of rocking and eyes incapable of pity, but in too many cases they do. Whether this is a problem of admission standards, legal education or the practice of law is far from clear. Most likely all segments of the legal profession are implicated. The important point is that the loss of human perspective be recognized as an element of incompetence and that steps be taken to combat it. A blending of humanity and intellect will not in itself guarantee competent lawyers; however, it can provide the foundation for true professional service. Such service would minimize the social costs to the legal consumer and enhance the stature of the legal profession as well.

FOOTNOTES

1. Excerpt from a poem by Denise Levertov entitled "Intrusion" quoted by Professor Caleb Foote of the School of Law, Boalt Hall, University of California Berkeley in his address given at the Commencement Exercises of the Class of 1978 on May 20, 1978.

2. M. Twain, *Life on the Mississippi* (1883), ch. 8.

3. J. B. White, *The Legal Imagination* (Boston: 1973), 10-13.

4. This view appears to be shared by Professor Francis Allen in "New Anti-Intellectualism in American Legal Education," 28 *Mercer L. Rev.*, 447-62 (1976).

5. Frankel, "Curling Lawyer's Incompetence--Primum Non Nocere," 10 *Creighton L. Rev.*, 613, at 614-15 (1977). The same conclusion is reached in the First and Second Annual Reports of the *Lay Observer* under Section 45 of the Solicitor's Act (U.K.), 1971.

6. *Ibid*, at 618-619.

7. L. Klar, "Recent Developments in The Law Relating to Solicitors Negligence" (Paper prepared for the 1978 Mid-Winter Meeting of the Canadian Bar Association, Alberta Branch).

8. N. Gold, "Competence and Continuing Legal Education" (A Paper presented to the Second Conference on The Quality of Legal Services held in Toronto during October 1980).

9. *Ibid*, 16-17.

10. Frankel, "The Search for Truth--An Umpireal View," 123 U. Pa. L. Rev. 1031 (1975).

11. W. Burger, "The Special Skills of Advocacy," 42 *Fordham L. Rev.*, 227-43 (1973-74).

12. Cramton and Jensen, "The State of Trial Advocacy and Legal Education--Three New Studies," 30 *J. Leg. Ed.*, 253-69 (1979).

13. Allen, *supra* note 4.

PROFESSOR STEWART MACAULAY
UNIVERSITY OF WISCONSIN-MADISON

The social costs of incompetent lawyers is a difficult topic. On the one hand, the matter seems so obvious. On the other hand, upon reflection it seems less clear cut. Suppose a trial judge appoints a friend to defend a woman who stabbed and killed her husband. This lawyer needs the work, but, as the judge knows, he is not a very good craftsman. He does a poor job of getting evidence of provocation before the jury in a persuasive manner, and he fails to ask for an instruction to the jury which emphasizes the prosecutor's need to prove the type of intention required for first degree murder. The woman is convicted of this crime. What are the costs of this incompetence?

The cost to the woman seems obvious at first. She is going to prison for a term which will be longer than that she would serve had she been acquitted or convicted of one of the lesser types of homocide. And whatever the outrageous rhetoric of the over-privileged, even the most modern and progressive minimum security prison is not a place any of us would want to be sentenced to. Most prisons, of course, are not modern, progressive and minimum security places. Conceding this, we cannot be sure that had our defendant been represented by the finest lawyer practicing in the jurisdiction who did get the question of provocation before the jury in the most persuasive way and who did get the most favorable possible instruction, she would not have been convicted of first degree murder anyway. She has lost a chance, and it is one most of us would want to have if we were to find ourselves on trial. Nonetheless, the case might have come out just the same whatever the skill of her lawyer.

Even if we agree that her lost chance is a real cost to her, what are the social costs in such a situation? Of course, the society that tries her will have to pay the added costs of her incarceration for a longer time than had she been acquitted or found guilty of a lesser crime. Yet in polemics about law and order, this does not seem to be a cost which concerns many people. Moreover, this cost has not been central to those who have talked or written about professional competence.

To continue with this example, suppose the defendant and everyone who participated in or watched the trial were unaware of what could have been done on cross examination or of the law calling for an instruction to the jury which would have increased her chances of acquittal or conviction of a lesser degree of homocide. The situation is somewhat like the classic debate over whether there is a sound when a tree falls in a forest when no one is there to hear. She has lost a chance which our system says is her right, but does it take awareness on the part of someone before we can see a social cost?

Suppose, however, that the defendant is or becomes aware of the lawyer's failings. Now she must bear all of the burdens of imprisonment with a sense of injustice--she is suffering not solely because of her wrongful conduct but also because of the judge's corruption and her lawyer's lack of skill or willingness to invest enough time in her case to try it properly. We can imagine all kinds of antisocial action as a result; it does not have to occur, but if it does, most of us can understand its causes. Suppose, further, a crusading journalist discovers what has happened and uses the story in a persuasive way as part of muckraking the legal profession and the criminal justice system. Most of us have strong defenses to muckraking, but if the journalist is skillful enough to break through, the incompetent lawyer and his friend, the judge, could produce a real social cost. If many people were to accept that this incident were typical or common enough for concern, it could feed cynicism about democratic institutions.

This example suggests some of the social costs of incompetent lawyering as they would be identified by the sociology of law. Under most theories of the role of law in society, society is held together by our expectations of what others will do and how they will react to our action. We may rationalize our conduct or expectations by reference to shared values or we may act in accordance with the dictates of those values. Disputes, in an integrated society, will not be common, but those that do occur serve important functions. On one hand, disputes and claims for services are inputs to decision-makers, signalling the need for considering whether adjustments should be made in the social system. On the other hand, disputes offer an opportunity to clarify social norms, to educate people about them and to legitimate the norms, the legal system and, ultimately, the society to various audiences.

(Of course, one could shift to a radical perspective critical of liberal legalism and structural-functional theory by changing the vocabulary. People would be repressed, partially by a false consciousness which the law would support by mystification. While the distinctions between such things as legitimation and mystification may be important for some purposes, they do not seem significant here.)

The incompetent performance of lawyer's role may cause the wrong person to win a law suit or the conviction of the wrong person of committing a crime. This can distort or block any signal to decision-makers, warning them that problems should be looked at. If a lawyer fails to raise an issue at trial or on appeal, courts may lose an opportunity to clarify values and educate the public. Parties may feel cheated and ill served if they are victims of shoddy lawyering. They may question the legitimacy of the decision, the legal system or the whole society. Others may be shocked if they become aware of what seems to be a significant amount of incompetence. Few who watch our courts in operation come away reassured. Indeed, Mr. Chief Justice Burger's campaign against incompetence, somewhat paradoxically, may itself be an important element in producing one of the social costs of shoddy lawyering. We might call this the Wizard of Oz theory of jurisprudence--everything would have been satisfactory if Toto, Dorothy's dog, had not knocked down the screen and disclosed that the Wizard of Oz was a charlatan. Of course, when we find that the Wizard lacks real magical powers, we could always redefine the situation so that it appears to be the best solution possible. More radically, we could look for a wizard with real magical powers, but that is seldom attempted.

If, as I suggested earlier in this conference, we broaden our view of lawyer incompetence to include such thing as trying cases which should have been settled, taking an overly technical approach or settling cases which should have been tried, we can see similar social costs. We have a growing body of literature on the "litigation explosion." We are supposed to be seeking riches and retribution by suing everyone in sight. We read atrocity stories, such as one about a man suing his mother and father for malpractice in parenting or another about people suing a close relative's physician for failure to produce miracles. Of course, the villain's role in these tales often is played by the greedy lawyer, eager for work. He seduces decent people and transforms them into litigants whose claims must be resisted.

While we can question whether there is a litigation explosion rather than merely a noticeable increase in willingness to assert rights, insofar as we become more litigious, there is a social cost which must be matched against its benefits. Instead of forgetting imagined complaints or working out some mutually satisfactory accommodation, the lawyer is throwing gasoline on a fire. Trust and the give-and-take necessary for social cooperation is imperiled. Instead of social harmony, lawyers produce conflict. Instead of compromise and restoration of relationships, they produce vindictiveness, bitterness and long-term grudges. The authority of doctors, teachers, those who offer social services and those who run institutions is undercut by demands for due process and the need to be able to justify any action taken in an adversary proceeding. Instead of doing the job as they know how to do it, such people protect themselves and become cynical. Rather than decision by expert, we get defense against lawyers. Procedures become more important than results.

In good law professor fashion, let me leap to the other side. Lawyers do turn away some potential clients and they settle claims for less than they could gain by better bargaining or by litigating. These lawyers serve their own economic interest by increasing the certainty of getting paid something, low investment in research and investigation of the case and by being able to handle many clients rapidly. Earlier I suggested that we might debate whether this was a problem of ethics or competence and suggested that often it reflected the way we deliver legal services and the naive or hypocritical creation of rights without provision of the means of vindicating them.

In an odd way, lawyers who play coercive-mediator and manipulate their clients so they accept gestures and token settlements may, on occasion, produce social benefits. They guard the courts, protecting them from greater overload. They put out fires of righteous anger and work toward social harmony. They reinforce the idea that litigation is aggressive warfare appropriate only for outrageous situations. On the other hand, lawyers who sell out their clients cheaply rob decision-makers of disputes as inputs, and we lose the chance to clarify values and educate people about problems and their solutions. Moreover, lawyers who attempt to cool out their clients with gestures and token settlements and fail to persuade their clients to give in, may greatly damage their clients' perceptions of the legitimacy of the legal system. This may be a problem of some importance now. During the 1960s and 1970s, we created new rights for individuals in many situations in response to a variety of problems. However, presently we we are failing to come close to performing the promises made in all of that legislation and case law. Legal agencies cannot or will not enforce the law, and lawyers cannot vindicate the newly created private rights but offer no more than token settlements. There is a movement to delegalize and offer more compromise and less vindication.[1] Moreover, matters may get worse. The Reagan administration proposes to end or curb government subsidized legal services. Some of the President's more right-wing supporters are working to impose even greater curbs so that cost barriers will block, even to a greater extent than before, the assertion of the rights won in the 1960s and 1970s. Insofar as those laws were to serve to conserve the existing society with some accommodation of the grievances of those left out, the risk of too little, rather than too much, litigation may entail a very high social cost in the loss of what legitimacy the legal system still has with the have-nots of our society. Insofar as lawyers refuse, or offer token settlements because they do not have the skill, to vindicate the rights granted in the 1960s and 1970s, this will contribute to the price we may pay for solving real social problems with short-run solutions of empty symbolism.

FOOTNOTE

1. Compare Santos, "Law and Community: The Changing Nature of State Power in Late Capitalism," 8 *International Journal of the Sociology of Law*, 379 (1980).

MADAM JUSTICE CONSTANCE GLUBE
Nova Scotia Supreme Court

A traditional discussion on the social implications of professional incompetence might begin with the quotation from Juvenal, "sed quis custodiet ipsos custodes?" This is loosely translated--'but who shall guard the guardians themselves.'

Lawyers and judges are custodians of a legalistic society. On a good day, we are the conscience of our civilization. For a moment, let us move past that familiar proposition of our obligation to society as members of the legal profession. Let us look beyond our custodial role to our obligations, to ourselves. Initially, instead of talking about our role as society's custodian, let us deal with our role as society's member.

As a person, I am minute by minute reminded of my own humanity. It can be very humbling. Looking inward, the self-healing process is an attempt to make oneself a more complete member of society. Our profession is full of members who are lawyers or judges first and members of society a very distant second; they are sometimes called 'workaholics.'

Let me give you an example. I met a young man from another province who was buying his first home. His real estate agent, whom he trusted, recommended a lawyer. He called and was told it was not necessary to speak with the lawyer; everything would be handled for him. Later on, he called again requesting certain information necessary to arrange his finances. Again he was told it was not necessary to speak with the lawyer and the secretary gave him the calculation which later proved to be less than the amount he actually required. He was advised of the closing date at which time he finally saw the lawyer for five or ten minutes and his questions were answered, but with impatience and not to his satisfaction. He still feels dissatisfied, simply because he was not treated as an individual, but as a cog in the machinery. The production of the lawyer was excellent, but his bedside manner left a lot to be desired. I asked the young man if he would ever use that lawyer again. His response? An emphatic 'never.'

Failure to talk to your client has to be wrong, whether it relates to the client buying a home or the one who is going to court.

One cannot say that that lawyer was incompetent, but he failed to recognize his role in society.

Our topic is professional incompetence as a social concern, its effect upon social attitudes and upon the image of the legal profession. As might be anticipated, my view is somewhat slanted, coming from the judiciary.

We must not move too hastily in determining who is incompetent. For example, a civil trial lawyer I have seen in court a number of times, very able and recognized as such, became involved in a semi-criminal case with a jury. A day into the trial, I was reading up on the law in preparation for drafting a charge to the jury when I realized the defence was improperly based on the criminal code instead of on a provincial statute. I brought it to the attention of both counsel; neither had recognized the difficulty. An amendment was allowed as no one had been prejudiced and we proceeded with the trial.

One could say it was inexperience in the field of law on the part of counsel and possibly poor preparation on my part. I might well have recognized it at the pre-trial conference, but was it incompetence?

A Book for Judges by the Honourable J.O. Wilson states at p. 51:

> In civil cases it is not unusual for a judge to be confronted with a situation where one counsel, through inexperience, inadvertence or just plain incompetence has failed properly to state his claim or his defence.
>
> If counsel, however, belatedly comes to realize his error and applies to amend, no problem of conduct arises and the judge can apply the well-known rules of practice and reported decisions, generally and properly highly favourable to necessary amendments at any state of the proceedings; and it has frequently been said that there can be no injustices to the other side if it can be compensated in costs.
>
> But suppose that erring counsel does not realize his error and plows ahead without seeking to amend. Is it proper for the judge at that stage to point out the probable mistake and to suggest to counsel that he might apply to amend?
>
> If he does so, opposing counsel, confidently awaiting victory, will probably be annoyed. But we think that the primary duty of the judge is to litigants, not to lawyers, and that the judge should consider the position of the litigant, confidently awaiting justice. Therefore we think that a judge in such a situation has not only a right but a duty to warn the erring counsel and to entertain, though not necessarily to accede to, any subsequent application to amend.
>
> However, there may be grave injustice if an amendment is allowed at any stage of the proceedings without giving to the other side opportunities of
>
> (a) further discovery;
> (b) further preparation for trial;
> (c) an adjournment of trial and (or)
> (d) a re-opening of the trial on the new issues created by the amendment.

It is essential to justice, therefore that counsel be heard not only as to whether the amendment be allowed, but also, if it is to be allowed, as to the terms on which it should be allowed.

Let us not label someone imcompetent without knowing all the facts. To make hasty judgment of incompetence can do great injustice which may far outway the perceived incompetence.

As a judge hearing a case, I sometimes conclude that the lawyer has failed miserably and is totally incompetent because, for example, the lawyer does not, on cross-examination, ask questions which to me appear obvious and necessary. One must be wary. It is often a deliberate omission. The lawyer knows where such a question will lead and it should not be asked. The lawyer has acted in his client's best interest and is not in any way incompetent. Neither judge nor jury have the benefit of the discovery or preliminary processes as the lawyer has had.

The court must therefore be wary of extensive intervention in a case. Once all counsel have concluded the examination of a witness, the court has a right to ask questions concerning areas left 'up in the air' and necessary to determine the issues. Failure to ask the questions could be incompetence on the part of the judge. However, excessive intervention by a judge is wrong and has been found so in the case law. It is sometimes a fine line. If a judge recognizes that competent counsel are involved, then certain questions may well be left unasked and only questions to clarify a witness' testimony need be asked. If a jury is involved and the judge is unable to understand the expert evidence, rest assured the jury will not either and clarification should be sought. Sometimes there is a language difficulty by the witness and sometimes a witness has obviously misunderstood a question.

Examples of typical permissible type of questions again are found in A Book for Judges (supra), at p. 47:

> 1. In a rape case, if counsel have not asked the complainant whether she is married to the accused, the judge may properly do so.
> 2. In a civil case relating to a motor vehicle accident, if it has not been established who was driving a motor vehicle involved in the accident, a judge may properly ask the necessary question.
> 3. If, in a criminal case, counsel has overlooked proof of the county in which the crime is alleged to have been committed, the judge may ask necessary question.

and, finally on this point, there is a sage admonition pronounced by the late Chief Justice Sloan of British Columbia as follows:

> A judge's first prayer should be, 'God, give me strength to button my lip.'

Requests for delays and adjournments which occur merely to suit counsels' convenience can be, and are I believe perceived as, a serious social concern. The clients may believe the court is at fault. Sometimes it is, or at least the court system is at fault. Cases set down by lawyers for one or two days which run longer give rise to possible serious injustice. There is cost and inconvenience to witnesses subpoenaed and not able to be heard in the time allotted; and finding another court date can result in several month's delay. If the delay between hearing dates is excessive, someone may want a transcript, increasing the costs and using court staff time which might have been avoided.

Rendering a decision on a case done piecemeal can become a horror story for the judge. It tends to double or treble the work of a judge and, no doubt, counsel as well. Judges try to anticipate overruns by pre-trial conferences in Nova Scotia but, unfortunately, it still happens. This may not be incompetence by anyone, but it is certainly mismanagement which is costly to all concerned.

Particularly in criminal trials, delays can be disastrous. When one finally gets to trial, the witness may have forgotten the evidence or disappeared or have died. The public perceives injustice and may be suspicious that the delay is not quite on the 'up and up.' Some lawyers "use" or abuse the system by electing trial by judge and jury knowing full well that they will re-elect to another court before the supreme court jury term, and that the other court could be booked for several months, thus, stringing out the process. Incompetence? Probably not, but it is suspect practice which gives rise to mistrust of the ethical standards of that counsel and can lead to substantial social costs.

What of the counsel who is painfully slow but thorough, sometimes to excess, determined to point out every slight variation in the evidence at trial in contrast to the evidence at the preliminary or on discovery? Again, cases can be extended a day or more by such practice. Is it incompetence? Not as one usually perceives or defines it, but it certainly raises the costs to all parties. It can affect the next case on the docket which cannot get heard, particularly in jury trials, and may in fact be counterproductive because judges are human.

However, I repeat--do not be too hasty in deciding that actions indicate incompetence.

I recall a case where counsel's pleadings were continually being amended throughout the trial. Counsel had the wrong documents for exhibits and generally made a terrible mess of the trial. I had seen the lawyer in court before and believed that the lawyer had a lot of courtroom experience. After the case was over and I had rendered my decision, I called the lawyer in and it turned out this was the lawyer's first civil trial. All previous court experiences and appearances were matrimonial. Also, the lawyer practiced alone. That individual was either too inexperienced or too proud to do something about it in advance. This was a case where a lawyer took on something beyond his ability. Incompetence? Perhaps in one sense. Certainly help and training were needed.

There have been many suggestions as to how to deal with perceived incompetence--additional and continued training, guidance, specialization and a variety of other remedies.

It would be preferable if somehow in some way we could eliminate the incompetent person before they ever entered law school. Discussions have taken place relating to the entrance requirements as they presently exist across Canada and suggestions have been made for changes in these requirements. It is, in my view, essentially a matter of finances. Private industry and governments have been able to deal with hiring people through psychological and intelligence tests. Perhaps the time has come for the law schools to aim in that direction. Most universities have almost built-in facilities with psychology departments and business administration departments that could assist in preparing and evaluating appropriate tests; but it is a matter of financing, considering the numbers who apply for law school entrance.

As for judges, delay in judgment delivery is certainly a social concern. Judges are obliged to be both quick and right. Decisive and prompt decisions are the outward manifestation of that attribute. As judges, we would like to cover all facets of the law in our decisions, but sometimes it is clearly unnecessary and results in undue delay which is perceived by the public as an inability to decide or a lack of industry on the part of a judge. Both or neither may be true. I have touched on the spaced out case which makes decision writing difficult. There is also the judge's place in the roster. On the other hand, it could well be procrastination and incompetence.

In Nova Scotia, judges do not specialize in court. We cannot turn down a case just because it is in an area of law outside our previous practice. A lawyer may redirect the client, or bring in counsel. Judges must become instant experts and do their homework both before and after a trial. A decision may not come out as a work of art or a model in writing style, but out it should come.

If judges are perceived to be incompetent, there is a forum for complaint, review, evaluation and decision through the Canadian Judicial Council. It is reasonably structured and made known at least to the judges.

At present in Nova Scotia, the Bar Society deals with the legal profession, but what could possibly be the system for a judge to report perceived professional incompetence? What procedure and standards could exist for a judge to follow? Unless it was extremely carefully handled and totally anonymous, it would be a dangerous thing for judges to report an individual lawyer, based on an individual case. Even with strict guidelines, judges would be leery of reporting a lawyer for incompetence because anonymity would have to be retained and the natural justice process of the lawyer might be infringed.

The practice which I follow and is followed by a number of judges is to express my concerns to the individual lawyer after I have rendered my decision and based on the specific trial involved. To jump to the Bar Society even with ground rules would be totally unfair and unrealistic and I would suggest it is rarely if ever done.

Judges sometimes try to cover the situation when they deal with costs in a case, but to deny costs affects the litigant and appears to me to be unfair.

Assuming we have a definition of incompetence, incompetent lawyers lead to breakdown in the whole legal system. The costs to society and the individuals can be enormous. A person may win the case, but lose the battle due to the high cost of unnecessarily going through the courts.

If the legal profession is not viewed as doing its job efficiently, the law falls into disrepute. People stop trusting the law and our whole system breaks down. People abandon legitimate claims because the costs outweigh the result. There are only a few who will see it through as a matter of principle. Some will discover incompetence in a lawyer and resolve the problem privately with the lawyer because it is easier to do that than go through the court system which sometimes takes years from the original claim to the final court appeal. Worse still, when a lay person perceives incompetence in a lawyer, they often do nothing about it because they may feel that the lawyers will stick together to protect each other; that it is not worth it; or they settle or change lawyers. Unfortunately, that leaves that incompetent lawyer free to perpetrate his incompetence on others.

If respect for the law is lost, people take the law into their own hands. That, of course, is the extreme, but has and will happen as has been seen in certain countries.

Where is the breaking point between incompetence and laziness, or incompetence and taking on too much work? There is actually a personal conflict between making money and practicing law. Proving incompetence can be extremely difficult. Yet incompetent lawyers are a serious concern and cost to society, but how does one even define incompetence?

Certainly there should be self-regulation by the profession, but perhaps there should also be government and consumer action.

As I said at the beginning of my remarks, we must emphasize looking inward and developing social consciousness among lawyers and judges. It is not clearcut when a lawyer should have social concerns versus economic concerns. People do practice law to make a living but, on the other hand, there must be a moral standard which is met. What is that balance? One sometimes gets the impression that the profession is so competitive that many suppress their ethical and moral standards in an effort to succeed.

We as individuals must keep growing as persons. Perhaps society cannot become what it should be until the custodians become what they should be. We must take time to look inward for social implications and solutions to incompetence in our profession.

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What are the social costs of incompetence in the law? If you are a lawyer, or a person with legal training, obviously this question evokes certain responses. But if you are not trained in the law and are instead from time to time a consumer of the services of a lawyer, the question presents quite a different picture. It is this latter picture which is the topic of this paper. Perhaps one could restate the topic to read: What are the costs to society of the incompetent lawyer? Before commencing however, one must congratulate the profession for its concern with this topic; not many professions have shown a similar concern.

Gone, hopefully forever, are the days of the innocent person being put to death because of an incompetent defence attorney.[1] Nevertheless, this topic brings forth all sorts of lively scenarios and one can imagine with delight and horror, the issue being debated on television in either a segment of a soap opera like Dallas or with the Chief Justice on The Watson Report.

The fact is, the social costs of legal incompetence depend upon the segment of society in question and it is impossible for anyone to total up the costs. For instance, what are the consequences of Imperial Oil or the province of Nova Scotia being given incompetent advice? The answer is--probably very little, for they can afford to obtain a number of opinions. Compare that with the Bella Coola tribe in British Columbia, or the bereaved family having to administer a poorly drawn will, or the senior citizen facing a shoplifting charge. The law is so all-encompassing that it is impossible to arrive at any satisfactory set of criteria that would answer the question poised by the topic. Instead, one must look at this topic from a general perspective.

Incompetence is difficult to define. For example, to anyone with legal training it is possible to understand the Supreme Court of Canada's decisions in the Drybones and Lavell cases. We may not agree with these decisions but we can understand the court's arguments. But place yourself in the position of those who supported Jeannette Lavell; to many of them the Lavell decision was just incomprehensible. Incompetence, of course, is in the eyes of the beholder rather than in that of the alleged offender.

This paper discusses four aspects of the beholder's notion of incompetence. They may be summarized as; the need for proving competency, the mystery of the law, the general good of and for the public, and the need for profession to support public legal education.

William Shakespeare in Henry VI Part 2 wrote: "The first thing we do, lets kill all the lawyers."[2]

Fortunately perhaps, the lawyers have made certain that this option is not open to us even if we wanted to use it. Lawyers are like the hydra, lop off one head and another will immediately spring up. If we are not to live in the "State of Nature" but rather as John Locke wrote, we are to be governed by a "social contract," then we must have laws through which we are to govern ourselves. If lawyers did not exist we would have to invent them. However, just because lawyers are necessary does not mean that we should not demand a certain standard of excellence and insist that the government provide society with machinery to police the lawyers.

But, of course, there is a conflict of interest. Far too many lawyers are in politics and they have a built-in conflict of interest between the protection of the interests of society and that of their own profession. No conflict of interest legislation could ever overcome this issue. Thus, it is the duty of society and of the legal profession itself to be ever vigilant in demanding that the incompetent practitioners be disciplined.

This unfortunately, is not a simple task for either society or the profession. Society, and some practitioners, have what might be called the "Erle Stanley Gardner TV myth" view of the lawyer. This myth, which is perpetuated by television, is that lawyers are all-able, all-knowing, and all-seeing when it comes to tackling society's legal problems. This is not the case and not even a combination of J.J. Robinette and Ken Dryden could live up this popular conception of the lawyer. The profession should discourage those practitioners who would wish to perpetuate the TV myth.

Philosophy and practice do not always go together. Philosophically the legal profession is in support of continuing education. However, practice is another matter. We see the medical profession demanding refresher courses, but not the lawyers. In February of this year 251 practitioners attended the Nova Scotia Bar Refresher course. In April, 240 attended the first "core course" of 1981. As of April 30th, there are 1098 persons holding a Nova Scotia "practicing certificate" of which 956 are resident in the province. Is a refresher course participation rate of 26.25 percent satisfactory? The answer, from the viewpoint of society, is obvious.

Are the advances in medical science greater than those in the law? More spectacular perhaps, but that is not the issue. Would you go to a medical doctor or dentist who refuses to attend refresher courses? Would you trust a pharmacist who does not go to his refresher courses? Well then, why should lawyers not be expected to attend similar courses and at their own expense? In order to protect society should CLE courses become a required prerequisite to continued certification? We may not be able to "kill the lawyers," but surely we can put pressure on them to "clean up their act." Lord Hewart's dictum "that justice should not only be done, but should manifestly and undoubtedly be seen to be done,"[3] applies to lawyers as well as to judges. Can the profession truly say that this is the case today, given its indifference towards CLE courses?

The public might well be better served if Bar Associations spent a little less time disciplining (Note: Yes, we've got to stop this disciplining) members who advertise their fees and more time on promoting the need for all members (yes, even the senior partners) to participate in refresher courses. Compulsory refresher courses will not end incompetence, but they will illustrate to society that the legal profession is serious about the problem, and perhaps osmosis will work.

The practicing lawyer, as the Canadian Bar Association's Code of Professional Conduct states: "... owes a duty to his client to be competent to perform the legal services which the lawyer undertakes on his behalf."[4] But does he? Take for example the action of Mr. Justice Bouck in the case of Brisseau v. Martin and Robertson, [1978, B.C.S.C.]:[5]

> These proceedings cannot continue. It is apparent to me the nature of this case is far beyond the ability of counsel for the Plaintiff. It is not a difficult law suit. Unfortunately the record will show the Plaintiff's representative has little comprehension of how the action should have been framed and the essential ingredients which need to be proved. Nothing will be gained by articulating these deficiencies.
>
> Some might say it is not the place of a Judge to stop an action part way through merely because one party or another has imperfect counsel. I agree, except where the situation reaches a stage that an obvious travesty of justice is taking place. In these instances, and this is one of them, a Judge just cannot sit back and let the matter take its course. Not only am I sworn to administer the law but I also have a duty to see that justice is done so far as the law allows. Members of the Law Society have the exclusive right to represent litigants in this court. It is a special privilege which works well in most instances. But if a member has either been inadequately trained or is indifferent in his preparation my first duty is to the the citizen and not the lawyer.

Or the following from two recent Nova Scotia cases:[6]

> i. My impression is that, between them, counsel for the parties have lost sight of the best interests of their respective clients. In the present case there may be a greater or lesser degree of fault on one side or the other but, on the information at hand, I am unable to choose between them and view the matter as one of joint responsibility. The resulting expense should not be borne by their clients and, in my opinion, neither counsel should bill his client for any services relative to the subject applications. By the same token it is my conclusion that neither party shall be entitled to costs herein.
>
> The Plaintiff is entitled to far better advice. He should consult more experienced counsel who knows how to conduct a civil case in this court.
>
> ii. In the circumstances I am going to declare a mistrial. The defendants will recover the costs for the two days of the trial. I see no reason why the Plaintiff should pay these costs personally and so counsel for the Plaintiff must pay them himself.
>
> Because of what has gone on here I am hopeful the Plaintiff will not be burdened with an account for

> services rendered by his adviser to date. No bill should be sent.

One hopes that these are isolated incidents--but can we be certain?

Let us now turn to the second aspect of the topic; that of mystery. In 1756 Edmund Burke wrote: "It is hard to say whether the doctors of law or divinity have made the greater advance in the lucrative business of mystery."[7]

The law is conundrum to the layman. And, with all due respect, the lawyer does his best to continue this mystery, building flying buttresses in the air to support his arcana and confuse the layman, especially those from certain strata of society.

What are the social consequences of all of this? Who is to say, for we only learn about incompetence because of actions like those of Mr. Justice Bouck. We seldom hear of those which are hushed-up or, of course, never detected.

Do we need public coroners for the legal profession? Can we expect judges, who are all too often overworked, to catch all of the incidences of professional incompetence? Probably not, and even if we did, not all cases of incompetence take place in the court room. No, we must give the profession, including its law schools and CLE societies, an opportunity to police incompetence. But if they fail to act, then the public has a right to request that government establish independent citizen regulatory boards or Ombudsman for the legal profession.[8] The lucrative business of mystery of which Burke wrote should not be allowed to continue and grow unchecked for it could become the security blanket by which incompetence can be covered up.

In contemporary society there is a greater need for the lawyer than ever before. Whether it be in real estate, taxes, family law, consumer law, university law, criminal law, labour law, or perhaps even constitutional law and the Charter of Rights, the demands on the legal profession and the courts are increasing. Thus, society must be assured that their lawyers are adequately trained and are competent to demystify the law in question.

"Ignorance of the law," as John Selden has pointed out, "excuses no man."[9] Yet, so long as the law remains a mystery it is difficult for those from certain segments of society to grasp the significance of their actions.

Competence is a two-edged sword. Not only must the practitioner be proficient, but the citizen must be educated as to the changes in both the statute and common law. The citizen must also realize the role and function of the lawyer within the legal process. Thus the legal profession has a duty to support public legal education in order to promote a better understanding of the law and its practitioners. Public legal education might well prove to be the most appropriate way to deal with the social consequences of incompetence.

If law societies are truly concerned about the issue of professional competence and the law--they will see the need for public legal education. An attuned public is an attentive public.

The law may be a mystery, it may be as Mr. Bumble said, "an ass", but it is the code by and through which man has chosen to govern himself, for without law we have chaos and anarchy. Consequently, it is the duty of the lawyer to explain the law to the layman.

At this point, I am referring to the press coverage given to the recent constitutional appeal on the patriation package heard by the Supreme Court of Canada. Were you as a lawyer and as a citizen happy with the press coverage? This is not a new problem in Canada; Chief Justice Bora Laskin has spoken out about the poor coverage given to the court and its proceedings by the media. We do not have daily law reports to compare with those of The Times, though some papers, to their credit, have published the decisions of the Manitoba, Newfoundland, and Québec courts on the current constitutional issue.

What has this to do with the question of competence? Competence is not just to be looked for in the court room and the lawyers office, but it is also to be found in the street. Cicero wrote, "The good of the people is the chief law."[10] If one is to accept this view, then is it not a duty of those with professional legal training to strive for the good of the people by explaining and demystifying the current issues before the Court? Not only must the practitioner be competent, but the public must be able to understand the basic tenets of the law.

If the proposed Charter of Rights becomes a part of the constitutional law of Canada, the citizen is going to make increased demands upon the legal profession and the courts. Let us all, citizen and lawyer alike, have some idea of what we are talking about before the game gets underway and thus avoid any unnecessary charges of incompetence by society. Citizens may have great expectations of and for the Charter. These hopes may be dashed and if they are, the disappointed layman may wrongfully cry incompetence.

In conclusion, it is not the intent of the author to 'kill all the lawyers,' but I do favour the demystifying of the law. There is a role for the public to play--but one hopes that this can be done by the profession and not through government regulation.

The legal profession needs to become more concerned with the promotion of public legal education. One cannot help but notice in passing that the Nova Scotia Bar appears to be losing interest in PLE and wishes to cut back its support for this work because of the current economic climate. Such an action would be very shortsighted and might well damage the positive view of the Bar which is now held by society. Incidentally, although no cost-benefit statistics are available for PLE, one suspects that there is an eventual "benefit" to the legal profession.

As for continuing legal education, the following comments from the Report of the Special Committee on Competence published by the Law Society

> The advent of "consumerism" has emphasized consideration to providing competent service to the public in all fields, including that of the professions. The learned profession of law should certainly be in the forefront in taking all possible steps to bring its members to a high degree of competence.

St. Luke may have been correct when he said: "Woe unto you lawyers! for ye have taken away the key of knowledge."[12] This does not mean that you cannot return the key, for it is through education and communication that the real and imaginary social injustices of legal incompetence may be overcome.

FOOTNOTES

1. This issue has always been one which, to society, reflects the worst form of legal incompetence and has led to the publication of such polemics as Jacques Hébert, (Les Editons Du Jour, Montréal, 1964) I Accuse The Assassins of Coffin, and Isabel LeBourdais. The Trial of Steven Truscott, (McClelland and Stewart, Toronto, 1966).

2. Shakespeare, Henry VI Part 2, Act IV.

3. Per Lord Hewart, Kings Bench Reports, [1924] 1 KB 25, 259.

4. Code of Professional Conduct, C.B.A. (1974)

5. Brisseau v. Martin and Robertson (1978, B.C.S.C.)(C 775 324).

6. From two recent Nova Scotia decisions. The first is dated 4th February, 1981 and the second, 25 September 1978.

7. Edmund Burke, A Vindication of Natural Society.

8. Duncan, "Public Access to Law in the 1980's," 44 Sask. Law Rev. (1980).

9. John Selden, Law, page 99.

10. Cicero, De Legibus, III iii.

11. Report of the Special Committe on Competence, The Law Society of Manitoba, 1977, Appendix D3.

12. St. Luke, Ch. 11, V. 52.

PROFESSIONAL COMPETENCE AND THE LAW

Seventh Session: Saturday, May 30, 1981

DOWN THE ROAD: FORECASTING AND PRESCRIPTIONS

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PROFESSOR R. CRAMTON
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Last night some of you heard me talk about Murphy's Law: "Anything that can go wrong, will go wrong." My assignment today is to paint a picture of a glorious future. Where are we going? What lies ahead? And that leads me to Gallup's Law, otherwise known as the Fourth Rule of Forecasting: "He who would live by the crystal ball must be prepared to eat ground glass."

Here is what my crystal ball indicates concerning the world of legal education in the United States. First, legal education will become more diverse as schools, operating under very stringent resource limitations, attempt to establish distinctive programs to meet the special needs in their particular lawyer markets.

Second, there will be more emphasis in nearly all law school programs on common denominator lawyer skills such as interviewing, counselling, fact investigation, negotiation, and trial advocacy. This development is partly a response to an evident need. These skills are of great importance to nearly all practitioners; it has been demonstrated that they can be effectively taught in the law school setting; and it will become clear that they have highly intellectual and humane components which are fully consistent with broad and humanistic university law school education. It is in these areas that the material of other disciplines--particularly psychology, economics, and sociology--are going to be absorbed into the law school environment. In short, the teaching of lawyer skills will increasingly be perceived as both practical and theoretical, both legal and interdisciplinary, in character.

Third, legal education is going to become substantially more expensive and most of the increased cost will be borne by law students. The profession will not contribute substantial dollars to legal education, aside from alumni contributions and volunteered time. Nor will enhanced public funding be available in the United States. The argument in favour of public subsidy is weak since the effect of professional education is to create a capital asset for particular individuals who are going to earn a stream of income from it for a forty or fifty year period. It is not unfair for students to bear reasonable costs in acquiring this income-producing potential.

In the United states there is concern with what is referred to as transition education--the immediate preparation of law graduates for the bar in the period right after law school. I expect to see the development of a variety of courses, some paid for by students' hard cash and some provided by state bar authorities. These courses, emphasizing lawyer skills, will try to bridge the gap in preparing students for the details of practice in a particular jurisdiction. This development is already well underway and, if it continues, a substantial market for courses of this type will be created, much of it financed by student and law firm payments.

Dramatic changes in the structure and content of bar examinations are also in prospect. Improvement is needed in this area, and the possibilities for it are inviting.

At the present time the state bar examiners utilize essay and objective exams. The objective portion--the MBE--is essentially the LSAT all over again with substantially larger legal component based on first-year law school courses. The written essay exams generally in use concentrate on analytical skills in an unrealistic context. They are far removed from the problem-solving lawyer-client interaction, and exercise of practical judgment that characterize involvement in the real world. Efforts are being made to design tests that will probe these areas.

One promising possibility is a branching program test, utilizing an interactive computer. A student is put before a computer console that displays a basic fact situation, such as the fact that he represents a particular person who says he has such and such a problem. The student, like an actual lawyer, must ask questions to elicit necessary information. If he needs the detailed provisions of law, he can obtain them by asking specific questions. Then he must develop strategies. He gradually follows one branch of the problem as he gives advice and takes legal steps. He must also anticipate and respond to the counter moves that the other side takes. The student's performance can then be evaluated on the basis of his ability to analyse a problem and design effective means of dealing with it--all in the much more realistic setting of a simulated representation.

Another approach forces the student to conduct actual client interviews of courtroom demonstrations. The exercises are videotaped and then analyzed by experienced observers. Experiments are underway in California with this kind of bar exam. Although the costs are substantial and the difficulties are great, I expect a movement in this direction after a long period of test development--perhaps ten years. When it comes about, it will build pressure on law schools to teach more effectively the lawyer skills that the test requires.

Continuing changes are also on the horizon for the organization and structure of law practice. The revolution that is underway will have important effects. Lawyer advertising will become familiar and noncontroversial. De facto specialization in law practice will accelerate, but formal programs of specialization involving testing and licensing will continue to be resisted. The growth of national law firms will continue. On the state level, aggregations of lawyers in every major city will be tied together with computerized programs of routine legal practice, bringing relatively low cost service to middle income citizens and small businessmen through mechanization and reliance on paralegals. The organized bar may resist the reliance on nonlawyers in many legal clinic operations, but change is going to come. If the bar is too intransigent, courts and legislatures will come to the aid of this more efficient manner of meeting the routine legal problems of the poor and the middle class.

The variety and quality of continuing legal education will continue to grow and improve. I particularly look forward to the creation of programs of a longer nature--from four days to four weeks of full-time study--housed in a university law school and using faculty drawn from both the law school and legal practice to deal with specialized subjects in a very intensive way. Programs of this character will have a larger intellectual dimension. They will also help lawyers who could not otherwise qualify as specialists because they do not belong to firms or organizations where the opportunities for on-the-job-training, which provides access to these lucrative areas of practice, are readily available.

I hope that CLE will not become mandatory, although I fear that the pressures in this direction will prevail. I oppose the mandatory element because of the advantages of a market discipline and the greater effectiveness of voluntary learning. If a CLE organization has a captive audience, its programs need not be good in order to survive. If lawyers support such programs because they are worth the time or money, they will be good. The discipline and incentive of market failure are essential. It is also doubtful whether a lawyer, required to attend a program, will get much out of it. He may check in in the morning and then disappear at the coffee break for the rest of the day. The voluntary approach will result in better programs and more interested learners.

What will happen in the field of bar discipline? Disciplinary procedures will improve in staffing, quality, and frequency of use. More effective disciplinary machinery will cost money, and where this money is going to come from is a big problem. Most likely, funding will have to come from integrated state bars, since it is doubtful that voluntary bar assessments will support bar disciplinary activities at a level that the profession and the public recognize is required. In Massachusetts, which does not have an integrated bar, the bar association has already had to cut back on its staff and discipline efforts. Even though every responsible member of the bar seems to be saying it is absolutely necessary, the leadership cannot induce the membership to vote dues increases. Voluntary associations also lose members when the dues are perceived as too high. A taxing system will be required, which involves a state mechanism of one kind or another.

The costs of malpractice insurance will continue to rise. And liability rules may even evolve so that at some future time lawyers will be subject to perhaps nearly the same standards of conduct which judges now impose on doctors and other professionals. Experiments in peer review will emerge. Effective measures of helping lawyers who have problems will evolve as the initial step in the disciplinary process. Peer review mechanisms will prove so useful that they will become a permanent part of the general bar structure and arrangements in most jurisdictions. But this development is going to take a while.

Last night I talked generally about the elements of lawyer competence and the law school's role in producing a highly competent lawyer. I will not repeat that discussion today. The other speakers have illuminated many aspects of the subject. The admission of highly qualified students, in terms of character as well as intellect, has been emphasized by Mr. Maloney and other commentators. The importance of inculcating good work habits and disciplined modes of thought has been emphasized by Professor Janisch. In an era of student consumerism, faculty members may gradually soften the requirements of demanding teaching in an effort to maintain popularity or enrollment. We all know of areas of concern that faculties need to address: the failure of an elective curriculum to have sufficient structure or content; instances in which student writing or expression is not required to meet a high standard of performance; and trends toward less engagement and participation in law school as students and faculty become involved in part-time work.

One of the central issues, touched upon by both Professor MacDonald and Professor Hammond, is the definition of the appropriate lawyer role. Neither the model in which the lawyer is in control--an authority figure who knows what is good for the client--nor the competing model of the lawyer as a hired gun, who is totally subservient to the wishes of the client, is a satisfactory one. As law schools become involved more deeply in research and teaching which explore the dilemmas of lawyering, a more satisfactory model will emerge.

Participants in this conference have demonstrated some of the elements of a more satisfactory model: a concern for others, personal integrity, and a moral dialogue in which every participant is endowed with responsibility and value. It has been a pleasure to join with you and learn from you.

MR. JUSTICE JONES
SUPREME COURT OF NOVA SCOTIA--APPEAL DIVISION

I will first give you some of my views based on my personal experience as a member of the judiciary. Of necessity, my remarks will have reference to the problems as I see them in Nova Scotia.

I wish to make reference to the Manitoba "Special Committee Report on Legal Competence," chaired by Mr. Justice Matas. Much of that Report is applicable to the Canadian Scene and to the problems being encountered in Nova Scotia. In a speech to the Canadian Association of Law Teachers, Mr. Justice Matas outlined the objects of legal training as follows:

> What kind of lawyer should we be looking for? Everyone has his own definition. I suggest, as a start, that we should be educating lawyers to have a commitment to the rule of law, and to know and understand legal principles and the traditions of our profession. We may reasonably expect lawyers to carry out their professional duties with sensitivity to the public interest and with an awareness of their role as officers of the Court in the administration of justice. Education of lawyers should aim at developing professionals who will exercise sound judgment in analyzing and solving problems so that the needs of their clients will be well served.

In his Report he stated:

> Two related premises are fundamental to the recommendations in this report. The first premise is that the primary function of Manitoba's only law school should be the education of practicing lawyers. The second premise is that in the field of education, the primary obligation of the Society as the sole licensing authority for lawyers in Manitoba, is to ensure that its members are properly educated to serve their clients and the public interest.

If one accepts these objectives one has the advantage of setting a clear course to follow. They emphasize the responsibility of both faculty and the legal fraternity, not only to the student but to the public. Mr. Justice Matas stresses that this objective cannot be obtained without the closest cooperation of all segments of the profession.

In my view, legal education includes an important role on the part of the judiciary. Ultimately, the judiciary has a great deal to do with standards of professional conduct and competence, not so much through precedent but in the day-to-day conduct of cases.

I feel that the close and fruitful association which existed in the past between the faculty at this University and the Society has waned in the last twenty-five years. That association in the past was due to history and necessity. The change was due, in part, to the need for a greatly expanded faculty. I do not mean to suggest that legal education, from the university point of view, has not improved. I think we all agree that it has. On the other hand, one must recognize the responsibility of the profession in the educational process. Both parties must accept their responsibility. It will only be through close cooperation that the objectives of both can be recognized without an unnecessary duplication of effort. Justice Matas has attempted to strike a balance between the two, at the same time preserving the role of academic freedom and excellence insofar as the university function is concerned. I agree with those conclusions. The public and the bar have a legitimate interest in the subject of professional competence. Indeed that is a clear responsibility of the profession if it is to maintain the independence of the profession. The regulation of the profession has been vested in the Society. The alternative is, of course, some form of government regulation and consequent loss to the profession of its independence. All members of the professsion with whom I have been associated have always asked one thing from the university and that is academic excellence. I do not think there should be any misunderstanding, so far as the profession is concerned, in this Province on the point.

To what extent are we achieving the objectives in this Province of attaining competence, particularly in the art of advocacy? When I graduated in 1951 the bar in this Province was very small. I have not checked the figures but I would guess that there were some two hundred practitioners in the entire province. While we were a relatively large class of fifty-five, I believe only one member of the class went into practice initially on his own in Nova Scotia. There were a number of persons practicing alone but they were mostly senior and experienced lawyers. Most of the advocates were seasoned men with many years experience. The courts, from the Magistrates level to the Supreme Court, consisted of tough and knowledgeable veterans, impatient and demanding of the highest standards. Seniors would not permit juniors to appear in the higher courts except to assist, and seniors appeared regularly in the County and Magistrate's Courts on important cases. This resulted in a lengthy period of apprenticeship for junior lawyers, particularly in the Magistrate's Courts, before one worked up to the Supreme Court level. Money was scarce and the emphasis appeared to centre on professional competence.

The great expansion in our economy, bringing with it the explosion in education and the corresponding demand for legal services, inevitably brought about a change. In the past ten years the number of practicing lawyers in Nova Scotia has exceeded the one thousand mark. The trend has been for recent graduates to set up their own practices. The result has been a break in the educational process. Lawyers with relatively little or no training under experienced barristers are appearing at all levels of the court system. This includes complicated jury trials. The trend has also been to appoint younger and inexperienced magistrates and judges. This is not due to some new exuberance on the part of governments to accent youth, but in large measure to an inability to recruit experienced counsel because of economic and similar reasons. A strong bench can only be recruited from a strong bar.

The shift in emphasis has been away from litigation, particularly insofar as senior counsel are concerned, to more lucrative and possibly less demanding fields of law. The absorption of so many new lawyers into the profession in the last ten years has led to a bad case of indigestion. The bar has not been able to pass on its collective experience to such a large group. In the result incompetence no doubt is due, in large measure, to lack of experience. This will partially correct itself with time. The appointment of inexperienced judges will not assist the problem.

One way to improve the situation would be a system of specialization. While there is some movement in that direction, progress no doubt will be slow. We must recognize that many people do not have the ability or qualities to make good advocates. In the meantime, those responsible for professional training should urge students to consult with senior lawyers in any area involving expertise. Many cases where a young lawyer embarks on litigation would be quickly settled by a senior lawyer to the great advantage of the client. Senior counsel can be engaged in litigation cases to assist in the conduct of trials. The fruits of inexperience extend beyond the field of litigation. For example, corporate and tax problems can be expeditiously resolved by consultation with experienced lawyers in the field. These contacts, if encouraged, will be a rewarding educational experience for the junior lawyer.

As you know, the Rules of Civil Procedure have been vastly improved in this Province. The Rules, particularly through pre-trial conferences, offer an excellent opportunity for judges to assist the younger members of the profession and, accordingly, to balance the scales, without in any way compromising the impartiality of the bench. One of the great training grounds for young lawyers is Chambers. Unfortunately, in the larger firms there has been a tendency to send juniors to Chambers without supervision. This situation should not be tolerated.

While we have used the pre-trial conference to simplify litigation we have not actively used this as a tool to effect settlements. I think this is an area that should be pursued. Again, it would offset the failure to effect settlements due to inexperience.

The professional standards of conduct are the responsibility of the Society. The standards are set, not only through educational training, but also through discipline proceedings. One of the most effective tools in enforcing standards and assisting young lawyers is a system of audits. This has been opposed by many members of the Society for a number of years. The introduction of members to council and to discipline committees from outside the legal profession would go a long way to ensure public confidence in the profession.

My colleagues have referred in the past two days to particular areas where judges have noted incompetence. The collective experience of judges here, as in the United States, is that there is a problem. Cases are being adjourned needlessly. Witnesses are being asked to report day after day without being called. Jurors are being summonsed and dismissed. The cost for police and manpower continues to rise. One only has to refer to the personal suffering of litigants in criminal and family law cases to get a glimpse of the problem. I believe it is against this background that Chief Justice Burger and others have been discussing the problem. I have shared my colleagues' experience. It is one area where the weaknesses of both the bench and bar can be reasonably catalogued.

Mr. Justice Matas refers in his Report to the need for a commitment to the rule of law. There is a view among some younger lawyers, and judges, that judges have unlimited powers. In practice you hear it said that if you have a problem the solution is simply to get an order from the courts. Lower court judges are repeatedly making reference to their inherent powers, notwithstanding the fact that they are pure creatures of statute and have no powers except as conferred by statute.

Taking into account the present day costs of litigation, we cannot afford the economic loss resulting from incompetence in the litigation field. The cost of the ordinary jury trial today can run to four or five thousand dollars, without including lawyers' fees. The delays and adjournments, particularly at the lower court level, are inexcusable. A six months delay between arrest and summary trial or committal is common. These delays have been largely eliminated at the Supreme Court level through, I may say, the untiring efforts of Chief Justice Cowan. The Appeal Division has established procedures to the same end. We are now in the happy position where appeals are normally entered for hearing within ninety days of the notice of appeal. The backlog of outstanding cases has been completely eliminated. I realize, of course, that this is not possible in all areas of Canada because of the volume of cases. The point is that remarkable changes can be brought about by progressive leadership on the part of both the bar and judiciary. Needless to say, it is an unending struggle to bring about the necessary changes. Again, let me give you an example. In 1967 Nova Scotia established a committee to revise the Civil Procedure Rules. As the benefits of uniformity were obvious, we invited the other three Atlantic Provinces to join the committee without any financial commitment. We did not receive a positive response. In 1971 the new Civil Procedure Rules were proclaimed in Nova Scotia. Those Rules adopted advances made in every other jurisdiction, including the federal rules in the United States. The benefits of those procedures have been overwhelming. I note in the last edition of the "National" that New Brunswick now proposes to adopt revised Rules after almost two years of work at a cost of one hundred and fifty thousand dollars. The cost in Nova Scotia did not exceed twenty-five thousand dollars, apart from printing. New Brunswick could have had the same Rules as Nova Scotia in place for ten years at no cost. Unfortunately neither the bar nor the bench will have the advantage of uniformity of practice in the two provinces.

With reference to the Provincial Court, I note the appointment of a Chief Judge. With this appointment I look forward to an improvement in some of the problems in that court. Unfortunately, some judges resent any attempt to improve the competency and practice in the courts as being an infringement on judicial independence. I see no need for any such conflict. Additional judicial training and the adoption of uniform practices are essential if judicial competence is to be improved. Some steps must be taken to improve the practice in the Family Court. Two steps are obvious--one is to assign the responsibility of those courts to the attorney general, and the other is to appoint a Chief Judge. Delays of over six months in deciding protection or custody cases are intolerable from the point of view of the welfare of the children.

There must be a continuing rationalization of court structures. The present system has simply been allowed to evolve. Far too much judicial energy has been, and is, being expended pursuing matters of status and jurisdiction. Steps must be taken in this and other provinces to fully utilize or integrate the County Court into the Supreme Court system. The only apparent stumbling block to that proposal is the system of local judges. The present system does not lend itself to a standard of judicial competence. This is particularly important as the County Court judges are now local judges of the Supreme Court. Some form of centralization is necessary to ensure a minimum standard of competence in practice. There is no doubt that some intermediate solution to the problem can be found. A step in that direction would be to eliminate summary conviction appeals to the county Court. Jurisdiction in indictable cases could be exercised under an integrated system with or without juries. Any attempt to expand the jurisdiction of Provincial Court judges in indictable cases will only compound and not solve the problem. Part of the solution overall is to greatly curtail the function of the preliminary inquiry. Very useful experiments have been carried on in recent years in that field. The system of pre-trial conferences should be expanded to criminal cases, provided of course, the rights of accused persons are protected.

It is only natural that I should advocate the payment of appropriate judicial salaries and benefits. This is particularly important at all levels, including the Provincial Courts. I mention this as I want to add that the profession should resist any attempt to fully provincialize all courts by conferring the power of appointment of superior court judges on the provinces. Nothing, in my view, could more disastrously affect the level of competence of appointees. One only has to look at the variation of salaries and benefits paid by the provinces to the provincial judges to see what would result. The present system in Canada guarantees a degree of judicial independence and competence unequalled anywhere in the world. One might appropriately say: What has this to do with competence? These problems, as I have noted, are rankling many judges at the present time. An integrated Supreme Court would certainly improve the standards of service and competence from the public point of view.

Let me close by making a few brief remarks with reference to related matters. While I see no need to increase the basic three-year degree program in law school, obviously Masters programs in law could be made more readily available in specialized fields. This practice is now being followed in the field of business administration. The practical side of training must be left to the profession, although the university also has an important role to fulfil in this area. There is no need for the profession to infringe on or try to duplicate the work of the law schools. This can be assured if the university accepts the responsibility of providing the basic training of lawyers for practice.

Insofar as judges are concerned, the answer is simple. If you want competent judges you must appoint competent lawyers to the bench who have had extensive trial experience. There is some hope of weeding out incompetent lawyers. Unfortunately there is no way of ridding the bench of incompetent judges--one must wait until they retire.

Again, I want to emphasize our responsibility to the public, not only on the part of the bench and bar, but on the part of the university. All three branches of the profession depend on and emphasize the need for our independence and freedom. That freedom is not unique to any one branch of the profession. To maintain it, all three branches must cooperate.

MR. ARTHUR MALONEY, Q.C.
BARRISTER AND SOLICITOR

This morning I discussed my concerns as a practicing lawyer on the subject of Professional Competence. This afternoon I intend to touch briefly on ways in which I feel the present system might be improved and to discuss with you certain programs that have recently been introduced in Ontario and which I feel ultimately will raise the level of competence of the legal profession.

In view of my criticisms of the current methods used to evaluate applicants to law schools, I feel I should discuss some possible alternative methods of selecting potential candidates. In my view, unless we conduct empirical tests to determine whether the LSAT examinations accurately predict successfully the abilities of future lawyers, the use of these scores should be terminated by our law faculties. Since it is my firm belief that professional competence must begin with admission to law school, unless we can satisfy ourselves that LSAT scores are truly helpful in selecting future members of the profession, their use should be discontinued.

As I indicated in my remarks this morning I am disturbed about the present method of selection of candidates to law school which I believe places far too great an emphasis on academic grades and LSAT scores. I feel that this approach fails to take into account many of the essential qualities that should be considered in selecting future lawyers.

When I prepared my remarks for today I investigated the admission procedures followed by the Faculties of Medicine in the province of Ontario. Approximately 4,000 students apply for admission to medical schools in Ontario and there are 600 students accepted into the first year program within that province each year. Although the primary criteria used by the admissions committees of the various Medical Schools is academic excellence a great deal of weight is also attached to candidates' non-academic achievements.

All applicants are required to submit detailed biographical data as well as a personal letter outlining the reasons why they wish to study medicine. This material, in addition to required letters of reference is assessed by the various Admissions committees and plays an important role in the selection process. Most of the Medical Schools also conduct personal interviews with the applicants. In my view this is a far preferable procedure than that of our law schools.

As an example of the approach taken by the Medical Schools the following is the admission policy as set out in the Calendar for McMaster University in Hamilton, Ontario:

> The School of Medicine considers that the type of medical students selected will have a significant influence in achieving one of the basic objectives of the school; namely, meeting current and anticipated health needs both qualitatively and quantitatively. Since neither evaluation of these needs nor wisdom in selection are professional prerogatives, students in the course and members of the community, as well as faculty members, are involved in the review of applications.

> The aim is to select for the 100 places available students who not only have the necessary academic standards but also display personal characteristics which are deemed to be important for the practice of medicine. These include sensitivity to the emotional, psychological and physical aspects of patients; the ability to detect and solve problems; the ability to learn independently; and the ability to plan one's career in a way that reflects the needs of the community.

When one compares this policy to that of the Faculty of Law at the University of Toronto which is:

> To choose those applicants whom the admissions committee judges are likely to complete its program with the greatest intellectual return.

It becomes obvious that the medical profession in selecting future doctors shows more sensitivity to the needs of the public than does the legal profession.

Perhaps one possible method that could be studied would be the creation of a number of admission committees made up of representatives from the general public, the judiciary, the legal profession and the faculties of our various law schools. These committees could be given the responsibility of reviewing biographical data submitted by applicants to law schools and could also conduct personal interviews of promising candidates. General guidelines and criteria would have to be adoped by the various committees which would take into account all of the qualities considered to be important for practicing lawyers.

Obviously, due to the large numbers of applicants, this would be an extremely time-consuming and cumbersome procedure. It would necessitate a large number of committees made up of a variety of different members. However, notwithstanding the practical obstacles to such a procedure being instituted, it is my view that this type of approach would result in a better calibre of law student being admitted into our law schools and would ultimately result in a higher level of competence of the practicing bar.

It may be that a fairer way of selecting law students would be to set a minimum academic requirement to ensure that all applicants would have a suitable academic background to enable them to complete the rigorous three year academic study of law and then to select the candidates by lottery. I do not advocate that this procedure be instituted; however, it might turn out to be a better approach than the present reliance on LSAT scores.

Perhaps a practical way to begin to deal with the problem would be to combine these two methods with the present method of admission. This at least would provide us with information upon which to evaluate the various methods of admission.

Once these groups were admitted to law school their progress could be monitored and we would ultimately possess statistics and information which would enable us to revise our admission criteria further with a view to selecting those applicants who would ultimately best serve the profession and the public.

The selection of candidates by committees would enable consideration to be given to criteria such as language ability, personality, the geographic location within the country where the applicant would ultimately practice, cultural background, personal motivation and sensitivity to important characteristics that are now presently taken under review by Law School Admission Committees.

In my remarks this morning I express concern about the way in which law students are trained at law school and the effect in my experience this training is having on the present level of competence of the profession as a whole. The Honourable Mr. Justice Horace Krever of The Supreme Court of Ontario expressed similar concerns when he delivered the 1979 W.K. Kellogg lecture in Ottawa. He said:

> ... It is my belief that the University Law Schools are becoming less concerned about the needs of their students as future lawyers and totally uninterested, or at least uninvolved, in the process of legal education after the point at which the LL.B. Degree is granted. ... I reject as artificial the traditional concept of the conflict between the academic and practical in legal education and am persuaded that it is too often raised as a justification for avoiding responsibility.

One improvement that should be made to the present Law School curriculum, in my opinion, would be to provide for fewer optional courses at Law School. Although all Canadian Law Schools make certain courses mandatory in the first year there are a great many optional courses offered to students in second and third year. In many Law Schools it is possible for a student to graduate with an LL.B. Degree without having taken tax, corporate law, wills and trusts and many other important basic legal courses. This, I believe, should be changed. The answer usually given to this criticism is that students never neglect to take these important courses; however, in my view the profession owes a duty to the public to ensure that all students who receive an LL.B. degree and subsequently become licensed to practice law have received a full grounding in all basic legal courses. Therefore, in my opinion, Law Schools should reduce the number of optional courses available to law students and increase the number of mandatory basic courses that students must pursue. I feel this would have the effect of ensuring a higher degree of competence among the young lawyers practicing at the bar.

In addition, as I indicated this morning, I feel that there should be a closer working relationship between the Law Faculties and the Local Practicing Bars.

Law Students should be exposed at a very early stage to practitioners who will discuss with them practical problems encountered by lawyers every day and ethical considerations that students can expect to encounter as young lawyers.

Additionally, I am of the view that all law students should be required to spend a minimum amount of time in court observing various counsel in the conduct of both criminal and civil cases. This should be done with the cooperation of the local bench and bar so that students can be given the benefit of explanations by counsel and by the presiding trial judge.

It has been my experience that the Legal Aid Clinics conducted by most Law Schools serve an extremely useful public function. They expose law students to relatively minor problems experienced by citizens in the community and they also serve to promote a good deal of good will between the Law School and the community as a whole. In my view law students should be encouraged to participate in such programs over and above their academic studies.

I am also of the view that students in law schools should be required to participate in a greater number of moot courts and mock trials than they presently do, preferably in liaison with the local bench and bar so as to provide students with a good understanding of proper courtroom decorum and conduct. In my opinion, if Law Schools were to institute many of these suggestions, the level of competence of the bar would be uplifted and the public would thereby be better served.

Another necessary development in the practice of law is the advent of continuing legal education. I am confident that the level of competence of the profession is greatly enhanced by sound programs of continuing legal education. The Canadian Bar Association's Conference on the Quality of Legal Services in 1979 considered recommending mandatory continuing legal education. However, it declined to do so and instead proposed the following with respect to continuing legal education and competence:

> The conference regards continuing legal education as a means of maintaining and improving the competence of the legal profession in general and considers it essential that continuing legal education should become increasingly available to lawyers.

In my view, it is essential that our law societies provide comprehensive programs of continuing legal education. Mr. Sidney Robins (as he then was) commented on this problem in an article in the 1973 volume of The Society of Upper Canada Gazette. He said:

> With the intimidating bulk of new materials, new laws, new developments and new statutes that have been devised to cope with and facilitate complex relations in our society, how does a lawyer keep abreast? How does the profession ensure the confidence of its members--The quality of legal services?

In my opinion, the answer to Mr. Justice Robins' question is through the availability of continuing legal education to the bar.

It is essential, therefore, that law societies in all provinces ensure that there are adequate programs of continuing legal education so that the members of the profession can keep abreast of the areas of law in which they practice and so that the public can be adequately served and protected.

One means of ensuring the level of competence of the profession is to supervise the legal services provided to those clients who receive legal aid. In the province of Ontario in 1980 220,000 citizens applied for legal aid assistance. The staff of the Ontario Legal Aid Plan thereby assisted almost one quarter of a million people, not only in providing legal aid, but in providing summary legal advice in certain cases where it was warranted. 84,000 Legal Aid Certificicates were issued, 54 percent were for criminal matters and 46 percent were for civil actions.

I commend the Ontario Legal Aid Plan for a number of the programs instituted by it which, I feel, will serve to improve the level of legal services being provided to legally assisted clients.

In 1980 the Legal Aid Plan established a research facility to enable counsel acting for legally aided clients in criminal cases to obtain comprehensive and up-to-date material to aid in the defence. This facility, which is under the direction of Mr. Kenneth Chasse, analyzes fact situations referred to it and then provides detailed memoranda of law to the lawyer acting on behalf of the legally aided client. In my view this unique facility provides for a very high quality representation and, in addition, reduces the cost of legal aid by reducing the time spent by individual lawyers in preparing a defence.

Discussions are presently ongoing to expand this program so as to provide legal research assistance to lawyers acting for clients on private retainers. This service would be available to lawyers at a modest fee and would, hopefully, result in a reduction of the cost of litigation to citizens who are not given legal aid assistance.

Another innovative program initiated by the Ontario Legal Aid Plan over the last year was the "mentor" program. The program which was put into effect in the Toronto area formalizes ties between junior and senior criminal defence counsel.

I am honoured to co-chair this program with Mr. David G. Humphrey, Q.C. Under the program 25 Senior Defence Counsel have undertaken to each assist 5 Junior Counsel.

The junior counsel participating in the program now have available to them guidance in matters such as trial tactics, cross-examination and other important defence-oriented procedures. It is my firm belief that the mentor program will ensure that junior members of the bar who are desirous of pursuing a career in the criminal courts have available to them the expertise and guidance required to make their representation of their clients as effective as possible. The program has met with a great deal of success. It is of importance, not only because it provides assistance to young lawyers who are developing skills as advocates before the criminal courts, but it also provides a certain amount of protection to their clients. I would like to see this program expanded throughout the province so that young lawyers everywhere can benefit from it.

I am hopeful that a program similar to this one will, in the not too distant future, be introduced into the civil area as well as the criminal field. Since nearly half of the legal aid clients in Ontario are involved in civil matters such a program would serve a useful purpose in this area as well. In my opinion, programs such as the ones I have mentioned are necessary to ensure that the level of competence of the profession remains at an acceptably high level.

Before I close I wish to touch on one final topic which, in my view, must concern the legal profession of the future. Today I fear that too many laws and judicial decisions are forming the thin edge of a wedge which is resulting in further erosion of our individual right and freedoms as citizens in a democratic society. State interference is on the increase. In my view this state of affairs is not only unnecessary, it is dangerous, and must be resisted by the legal profession at all costs.

We have moved into the era of computer efficiency where the speed of technological advance is so marked that new inventions are almost obsolete by the time they come off the assembly-line. The great quest for efficiency that is so characteristic today will and, in fact, already has, produced dissatisfaction with the expense, the inconvenience and inefficiency of the system used to administer justice in this country. As I indicated this morning, the computer has even invaded the hallowed halls of our nation's law schools where our prospective law students must pursue such lofty things as LSAT ratings--a fairly recent invention appropriate to a computerized age that likes to solve all its problems by pushing a button.

One of the demands that will be made on the legal profession and which will be made over and over again, will be to restrict, if not eliminate, the whole procedure of trial by jury. No greater tragedy could befall us and I hope all of you will join with me to ensure that this never comes to pass.

If you were to ask me what feature of the administration of justice struck me as being its most outstanding I would have to say trial by jury. Of all the institutions contrived by imperfect man for his own safety and security the jury stands out like a beacon whose glare, far from diminishing, has become more dazzling over the long centuries of its history.

It is my deeply felt, and often expressed belief, that the community of attitudes that jurors bring to bear on their verdict renders them far better able to judge their peers than the most reasoned, dispassionate, competent judge, regardless of how well-intentioned he may be. A jury represents a combination of heart, mind and emotion which the empirical approach of the judge, however capable, can never equal. The jury represents a safeguard and a buffer that we should properly regard as one of our most precious and fundamental freedoms.

Given my intense belief about the importance of the jury system, a belief which has grown stronger day by day during my 37 years as a defence lawyer, I am strongly of the view that the legal profession must remain staunchly opposed to those who argue for its abolition. I was delighted to read that the Canadian Bar Association adopted as one of its proposals at its Annual Convention in Montreal last year the continued retention of the jury system and resistance to any move to further curtail the individual's right to trial by jury.

The words of the Great English writer, Gilbert Keith Chesterton, emphasize why I believe, not only that the jury system is profoundly important but also that continued tampering with it can only have the effect of destroying our justice system as we have come to know and love it. In his essay, Twelve Wise Men, which he wrote after he, himself, had served on a jury, Chesterton said:

> Now it is a terrible business to mark a man out for the vengeance of men. But is a thing to which a man can grow accustomed, as he can to other terrible things; he can even grow accustomed to the sun. And the horrible thing about all legal officials, even the best, about all judges, magistrates, barristers, detectives and policemen, is not that they are wicked (some of them are good), not that they are stupid, several of them are quite intelligent, it is simply that they have got quite used to it. Strictly they do not see the prisoner in the dock; all they see is the usual man in the usual place. They do not see the awful court of judgement; they only see their own workshop. Therefore, the instinct of christian civilization has most wisely declared that into their judgments there shall upon every occasion be infused fresh blood and fresh thoughts from the streets. Men shall come who can see the court, and see it all as one sees a new picture or a play hitherto unvisited. Our civilization has decided, and very justly decided, that determining the guilt or innocence of men is a thing too important to be trusted to trained men. It wishes for light upon that awful matter, it asks men who know no more law that I know, but who can feel the things that I felt in the jury box. When it wants a library catalogued or the solar system discovered, or any trifle of that kind, it uses up its specialists. But when it wishes anything done which is really serious, it collects twelve of the ordinary men standing around. The same thing was done, if I remember right, by the founder of christianity.

The legal profession, therefore, must be like the lighthouse keepers of yesterday and the electronic weather monitors of today. We must combine our gut instincts about what is right and just with an appreciation of the complexity of modern society, and carefully plot our course through the reefs of expedient thinking if we hope to keep the ship of justice, as we have known it for centuries, from floundering.

Attempts to limit access to jury trials must be resisted vigorously by all who value our system of justice, and it is because all of you represent the front line of any such resistance, that I have chosen to speak of this subject today.

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The words of Lord Devlin sum up better than I ever could the importance of the jury in our democratic system. He said:

> Each jury is a little parliament....I cannot see the one dying and the other surviving. The first object of any tyrant in Whitehall would be to make parliament utterly subservient to this will; and the next to overthrow or diminish trial by jury, for no tyrant could afford to leave a subject's freedom in the hands of twelve of his countrymen. So that trial by jury is more than an instrument of justice and more than one wheel of the constitution. It is the lamp that shows that freedom lives. To many of us the boundaries between Whitehall and Westminster are uncertain and confused. We are anxious that government should be strong and yet fearful lest the gathering momentum of executive power crush all else that is in our state. We look for some landmark that we may say that so long as it stands, we are safe; and if it is threatened we must resist. It is there this beacon that seven centuries have tended.

DISCUSSION

Dean Iacobucci: My question relates to what Mr. Maloney said. He cited the calendar of the Toronto faculty of law several times this afternoon. As Dean of this school, I never leave Toronto without a copy of the calendar. In particular, he quoted a couple of paragraphs about our admissions policy as set forth in the calendar. Unfortunately, he missed two paragraphs in the calendar which base admissions on more than the LSATs. In fact, the calendar does identify qualities of mind and personality and other areas of human potential, in addition to the law school admission test. The calendar refers to "non-academic achievement, motivation and involvement including linguistic and cultural background, economic hardship ... Having read those two paragraphs I do not again wish to imply that we reach a standard of perfection in identifying these personal characteristics. I do not think any institution can boast of such an accomplishment.

You [Mr. Maloney] also made some comments about the need for interaction between the bar, the judiciary and the law school. I should say that some sixty to seventy lawyers are involved in our law program in Ontario, in will drafting programs, in a real estate transaction program, etc. That does not count the cooperation we get from the bar in our moot court program; lawyers come up and sit as judges; they help in the advocacy program and the like. So I suppose there is a good deal of cooperation already.

Dean Adell: I am the Dean of law at Queen's. What Mr. Maloney seems to be adding as an element of competence is a capacity of lawyers to press for social reform, for changes in the law, and/or changes in the sorts of people through and for whom legal services are being provided. Now I think I can safely assure Mr. Maloney that many, if not most, law teachers in Canada would be delighted if we could make it an explicit and conscious criteria of our admissions policies that, before we let a student into law school, he or she must have an overriding interest in changing and improving society, in providing legal services and the like. But if we included qualifications like that, I would suggest that we would be subject to extensive criticism from the profession itself. Mr. Maloney is really talking about something other than basic competence as it is defined in the ALI-ABA criteria; for that definition precludes us from placing less weight on grades and on LSAT scores. In fact, I would join in kicking at the LSAT. Its most disturbing feature is that it gives rise to a variety of cram courses which aim at raising LSAT scores. To meet the white charger sorts of concerns that Mr. Maloney raises, we have at Queens, and at every law school in Ontario, if not across Canada, a special admissions program whereby we do explicitly call for and receive fully documented applications, in exactly the same way that medical school application are documented. These candidates are interviewed; references are taken on them; and in fact at our school, we even have two separate committees, a regular admissions and a special admissions committee, and we reserve fifteen percent of places in our first year class for these candidates. Their cognitive skills are not developed to the extent of the cognitive skills of our regularly admitted candidates. However, I would suggest that, empirically, the graduates who are most adept at, and the most inclined to, mount white chargers and to provide social good in their future careers, are those who have the highest cognitive skills. I think it is rather romantic to assume that students who come from deprived backgrounds or who are capable of articulating or willing to articulate, in interviews, concerns of the sort that Mr. Maloney expresses, are going to show very much higher likelihood for doing good in the future.

As far as curricular options, Mr. Maloney expresses a concern--in some respects it is a justified concern--about the proliferation of curricular options. But what he says, I think, runs squarely counter to the reality that has been alluded to earlier today, that is, the reality of increasing specialization in the practice of law. This fact is explicitly recognized the ALI-ABA competence criteria. If students are going to be able to handle the increasing complexities in areas like international business transactions, labour law and so forth, we have to move away from the old seamless web idea of the law and we have to provide specialized training for them in those areas of law. I would suggest that, if Mr. Maloney looked carefully through the calendar of almost any Canadian law school, he would find that most of the specialist options are advanced in areas where specialization is becoming increasingly important; and are not bird courses or frills thrown in for the amusement of students in our law schools.

Mr. Maloney: First, I am appreciative of the comments of both yourself and of Dean Iacobucci. In the case of Queens Law School, I should say that, in my personal experience over the last few years when I was Ombudsman and now when I am back in practice, two of my really greatest articling law students came from your law school. ... And in the case of the University of Toronto, I commented upon the tremendous criminal law program which you have there in which students are let out to practice as criminal lawyers, both as defence and crown lawyers. I have availed myself of that service and found it to be very good. All I am saying to you is that we should do more than that and forget about the LSAT. What is unfair about the whole matter is that hundreds of young men and women who want to be lawyers, cannot get into law school, because they failed to get high enough LSAT marks. I know so many of them who would have made great lawyers, who would have showed great judgement, and who would have showed great common sense in the resolution of human affairs. I think that it is unfair to rigidly adhere to this computerized idea and carve it in stone. Thank you.

Professor Cramton: I would not want to get in the middle of this intramural feuding between Canadian practitioners and Canadian law teachers, although some of it does have a certain ring of familiarity. I am reminded of the story about the rich man who had fallen on hard times and finally decided he would have to get his wife to economize, and he went to her and said "If you could only learn to cook, we could fire the cook." And she responded "And if you could learn to make love, we could get rid of the chauffeur too."

Professor Cotter: I am on the Dalhousie Law Faculty here and I am chairman of our Admissions Committee. I am not standing up trying to defend what we practice. But I would like to indicate a couple of things that are relatively recent concerns of a number of the law schools and a number of admissions people within such law schools. Two of the concerns that Mr. Maloney referred to have arisen in our meetings. The use of these kinds of quantitative testing methods like the LSAT and academic records; and the use of interviews for selecting law students.

The first is that, as Mr. Maloney rightly points out, there is no empirical evidence that people who perform well on law school admission tests can be expected to be better lawyers. There is one study which I would like to mention, because I believe it shows how difficult it is to measure who are our successful lawyers. The study was recently done by a series of American medical schools on minority applicants. It suggested that the correlation between the Medical School Admission Test which prospective doctors take and their ability to be good doctors is actually inverse. It is so hard to tell who are going to be good doctors, or who are likely to be good lawyers. Let me suggest one of the things which law firms do--and which I suggest that we implicitly recognize as the value of law school admission test. The tests themselves are clearly predictive of performance at law school. How predictive varies from school to school; but that predictability is the reason why they are used. They are predictive of academic records at law school. Moreover, law firms throughout the country come here looking for people with high academic credentials. That seems to me to be implicit recognition that the Law Schools Admission Test is predicting that people who have high academic credentials at law school are likely to be good lawyers in the long run.

Mr. Maloney's other concern relates to interviewing applicants for admission to law school. My understanding is that the University of Calgary interviews everybody before they take them into law school. I believe that is also an extensive practice in medical and dental schools throughout the country, as well as in veterinary schools. But one of the things that those schools have to do very carefully is train the people who conduct the interviews. Unless the interviewer is very carefully trained and acts professionally, the interviewer may well select people in whom they see their own qualities. Indeed, I may want people like myself in law school and in practice. That is the very serious concern; for the psychology of interviewing enters into the picture. The interview process can be very damaging and sometimes very unfair.

Lastly, if I could say this in relation to your suggestion about a composite admission policy; perhaps taking some people on the basis of marks, some people on the basis of records and their biographies, and some people on the basis of a lottery--which, as I understand it, Calgary has now discontinued. If you test that empirically to see how well people do in law school, the answer, I can tell you right now, is that the people who will do best in law school are those chosen on the basis of the highest marks and highest LSATs. If the test in the long run is: who will be the most successful lawyer, I once again have to ask, how will you measure who will be successful lawyers. My suggestion is that we all have our own, and probably different, opinions on that. Thank you.

Mr. Armstrong: I am quite fascinated by Professors Cramton's reference to the interactive computer branching program test and the use of video in law teaching. I wonder if if you might elaborate on that. It sounds to me that a large segment of the practicing bar is looking for that type of test as a possible form of self-assessment.

Professor Cramton: They developed a pilot bar examination and it was administered for the first time last summer to a fairly substantial sample of either two hundred and fifty or five hundred people. It cost hundreds of thousands of dollars just to do the experiment. It is not cheap. The results are going to be evaluated. The California Bar Examiners are very interested in it; in fact, there is a lot of interest throughout the United States in it. The program will be studied very carefully. The technology is there. It does require very good people--combinations of academics and practitioners and so on--to put together legal problems that are both realistic and demanding and do not have defects in them. You have to pre-test everything; then after you pre-test, you can go ahead and use it. The program requires a lot of equipment, but it is all available at a price. The use of interviewing and related techniques is more difficult because that involves using professional actors. These actors have to be very carefully trained. They are professionals who must respond to information requests from the applicant lawyer. The lawyer interviews them as clients; he get the facts from them and he uses a small law library to prepare and analyze the questions posed to them, and write a legal memorandum thereafter. In other words, the programs attempt to create a law office setting in which trained actors are clients with a whole script of the facts, who volunteer a lot of irrelevant detail. For example, they do not necessarily volunteer information; they do not supply written contracts unless the attorney asks for them; and they create obstacles just like lawyers encounter in handling real clients. The second computerized program, start with a very succinct statement of a problem. The attorney has to be able to recognize the legal ingredients, then ask further fact questions, then ask questions about what the law is. The student must decide how to resolve the problem. He has to say, "Well, what am I going to do next? Am I going to seek to settle the case? Am I going to go right to trial? What is the complaint?" He then branches out. The computer is programmed for all possible responses. It tells him what the other side will do and then he just keep playing the game. Finally the whole process is evaluated by the examiners. It is quite a realistic situation. It does not, of course, bring in interpersonal skills--the ability to facilitate an agreement among people, to elicit facts--but other parts of the program do this. One program tests interpersonal skills; the other provides a very realistic problem solving enterprise.

FAREWELL

Dean Charles

I am pleased that the only admission criteria that we have required for admission to this conference has been a simple payment of one hundred dollars. I am glad we did not go any further.

As a legal educator, it has been a real privilege to me to be part of these proceedings and to listen to what was said about the competence of lawyers. I suppose it goes without saying that we all recognize the importance of lawyers in our society and any occasion that enables us or requires us to consider the training of lawyers, the legal education of lawyers, is an occasion that should prove to be valuable and useful. And I think that has been the case during the past two days.

I think the proceedings as they appear in the printed form will give us a lot of thought. And I am sure that this will not be the end of the discussion on competence.

I would like to particularly thank the organizers of the conference and, especially Leon Trakman and Larry Steinberg, and also the various panel members who enabled us to carry on for the last few days with an interesting set of issues and questions. I also would like to thank all of you who came here, not only on Friday, but remained here today, late on Saturday afternoon. Thank you very much for attending. I hope this is the beginning of a fruitful national discussion. Farewell and a happy trip home to all of you.

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